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**MINNESOTA REPORTS**

**VOL. 124**

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**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT**

**OF MINNESOTA**

**DECEMBER 12 1913—FEBRUARY, 13, 1914.**

**HENRY BURLEIGH WENZELL**  
**REPORTER**

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**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE  
PEOPLE OF SAID STATE**

**(124 M.)**

**AUG 13 1914**

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OF  
THE SUPREME COURT  
OF MINNESOTA  
DURING THE TIME OF THESE REPORTS

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Hon. GEORGE L. BUNN  
Hon. PHILIP E. BROWN  
Hon. ANDREW HOLT  
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## NOTE

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*By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.*

*Pursuant to R. L. 1905, § 74, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.*

*With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases reported are from the October, 1913, term calendar.*

*As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.*

*In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.*

*The footnotes in the present volume which are preceded by the word "Note" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.*

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS  
WRITTEN BY THE COMMISSIONERS AND REPORT-  
ED IN THIS VOLUME WERE ADOPTED AS THE  
OPINIONS OF THE COURT BEFORE THEY WERE  
FILED, AND HAVE THE SAME FORCE AND EFFECT  
AS THOUGH WRITTEN BY A JUSTICE OF THE  
COURT.

FOR TABLE OF STATUTES CITED BY THE COURT,  
SEE INDEX, PAGES 630-636.

**CORRECTIONS**  
**VOLUME 121, p. 354**

The first 14 lines on the page should read as follows:

**"354**

**121 MINNESOTA REPORTS**

"and plaintiff elected to proceed upon the express contract. The court, in its charge, told the jury to return a verdict for plaintiff of \$5,000 and interest, if they found the contract proven, and, if they did not find it proven, to return a verdict for defendants. The jury returned a verdict for defendants, and plaintiff appeals from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

"The transactions between the parties were conducted wholly by Theodore Wetmore, on the part of plaintiff, and by Joseph T. Thurman, on the part of defendants. Defendant Thwing testifies that he had no talk with Wetmore, and that he received all his information concerning the transactions of Wetmore and the agreement or arrangement with him, from Thurman."

**VOLUME 122, p. 178**

The last 10 lines on the page should read as follows:

"has been cutting my fences, running over my land, and injuring my stock, and stole Crowley's hay and said my cattle ate it up." Dodge had not testified as a witness in the case, though it appears that he had been a witness against defendant in a former trial of the action before another justice. This is the version of the episode as given by plaintiff and the justice, and we must assume here that it is the correct one, though it differs in some particulars with the evidence of defendant and his witnesses.

"1. It is contended by defendant that the slanderous words were privileged, because spoken during the progress of the trial, and in"

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In each case the derangement of lines occurred at the printing office after the receipt of the last proof.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF MINNESOTA.

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GEORGE S. GILLESPIE v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

December 12, 1913.

Nos. 18,238—(111).

**Notice of use of explosives.**

1. Evidence *held* sufficient to sustain a finding charging defendant railroad company with notice of excavating operations being conducted on and near its right of way by another company, through a subcontractor, and also of the manner in which the work was being done, including the use of dynamite, so as to impose upon defendant the duty of warning plaintiff, its employee, before putting him at work on a semaphore pole located dangerously near the place where the blasting was going on.

**Verdict — evidence.**

2. Jury *held* justified in finding that plaintiff's injury from a blast followed in natural sequence from defendant's breach of duty in failing to warn him.

**Cause and effect.**

3. The causal connection was not broken by the fact that the excavation workmen, though knowing of plaintiff's presence, negligently failed to warn him before exploding the blast by which he was injured; such negligence

<sup>1</sup> Reported in 144 N. W. 466.

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Note.—The authorities on the question of the master's duty to warn servant engaged in blasting of dangers therefrom are collated in a note in 19 L.R.A.(N.S.) 997. And upon the duty of the master to warn or instruct servant, generally, see extensive note in 44 L.R.A. 33.



being a mere incident to that of defendant, or, at most, a mere contributing cause.

**Omission to charge jury.**

4. Failure of court, in instructing the jury, to call attention to the distinction between knowledge and notice, as imposing upon defendant the duty to warn, *held* not reversible error, in absence of request by defendant.

**Damages.**

5. Damages *held* not so excessive as to indicate passion or prejudice on the part of the jury.

**Reduction of verdict.**

6. Verdict as reduced by trial court sustained.

Action in the district court for St. Louis county to recover \$20,000 for personal injury received while in the employ of defendant. The answer denied that plaintiff sustained any injury whatever by reason of any negligence on the part of defendant, and alleged that plaintiff claimed his injury was caused by the negligence of another party or parties, and upon information and belief it alleged that plaintiff demanded compensation for the injuries from another, and thereafter for a valuable consideration to him in hand paid plaintiff compromised and adjusted all claims for damages on account of the injuries. The case was tried before Dibell, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict of \$11,375 in favor of plaintiff. Defendant's motion for judgment notwithstanding the verdict was denied and its motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to \$9,000, which consent was given. From the order denying its motion for judgment notwithstanding the verdict and granting its motion for a new trial unless plaintiff consented to a reduction of the verdict, defendant appealed. Affirmed.

*M. L. Countryman and Baldwin & Baldwin, for appellant.*

*Samuel A. Anderson and Warner E. Whipple, for respondent.*

PHILIP E. BROWN, J.

Appeal by defendant from an order denying its alternative motion after verdict for the plaintiff in an action to recover damages for personal injuries.

The accident occurred on January 25, 1912. Then, and previously, plaintiff was employed by defendant in keeping its semaphore appliances in repair. On the day stated, and for about three months prior thereto, another railway company was engaged, through a subcontractor, in excavating a roadbed across defendant's right of way, and to facilitate the work defendant had elevated its tracks for some 500 feet. In the course of the excavation operations dynamite was frequently used to blast out the earth. The charges were uncovered when fired, and the débris was thrown upon defendant's right of way and land adjacent thereto. The custom was, before firing, to warn the workmen and to flag defendant's trains. On the day in question, and for a day or two previously, defendant's bridge crew was working on its elevated tracks. One of defendant's semaphore poles, about 32 feet high, with a platform near its top, was located some 250 feet south of the southerly point of defendant's track elevation. While plaintiff was engaged, under order of his immediate superior, a signal supervisor, in putting this semaphore in working condition, a blast was set off by the subcontractor's employees, close to the end of the track elevation nearest the semaphore pole, but not on defendant's right of way. It was exploded in the ordinary way, with no unusual results, except that plaintiff, who was on the pole, was struck by flying material and injured. Plaintiff's superior officer was unaware of the blasting operations referred to, and there was no evidence that any of defendant's officers or managing agents had knowledge thereof. There was evidence sufficient to sustain a finding that plaintiff had no knowledge or warning of the blast which occasioned his injury, or that any blasting had been or was being done, though it appeared that shortly before the blast was exploded an excavation workman was sent to notify him, and did notify his helper on the ground.

1. On the issue of negligence, the court submitted the cause to the jury, solely upon plaintiff's claim that defendant was negligent in failing to give him warning or information as to the blasting operations before putting him at work on the semaphore pole. Defendant contends that it was under no duty either to warn plaintiff of this danger, which it insists was unknown to it, or of trespasses

on the part of strangers. This contention may shortly be disposed of. The master's duty to warn the servant of dangers not naturally incident to the employment, including those arising from extraneous sources, and which the former should in the exercise of reasonable care and diligence know of, and of which the latter has no knowledge or notice, we consider settled. See 26 Cyc. 1165, 1172; 3 Labatt, Master & S. (2d Ed.) § 1146. See also Guirney v. St. Paul, M. & M. Ry. Co. 43 Minn. 496, 46 N. W. 78, 19 Am. St. 256; Galloway v. Chicago, M. & St. P. Ry. Co. 56 Minn. 346, 57 N. W. 1058, 23 L.R.A. 442, 45 Am. St. 468; Lane v. Minnesota State Ag. Soc. 62 Minn. 175, 64 N. W. 382, 29 L.R.A. 708; Id. 67 Minn. 65, 69 N. W. 463; Thomas v. Wisconsin Central Ry. Co. 108 Minn. 485, 122 N. W. 456, 23 L.R.A.(N.S.) 954; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160; Bradburn v. Wabash R. Co. 134 Mich. 575, 96 N. W. 929; Landry v. Great Northern R. Co. 152 Wis. 379, 140 N. W. 75; Holshouser v. Denver Gas & E. Co. 18 Colo. App. 431, 72 Pac. 289; Kliegel v. Aitkin, 94 Wis. 432, 69 N. W. 67, 35 L.R.A. 219, 59 Am. St. 901; O'Connor v. Armour Packing Co. 158 Fed. 211, 85 C. C. A. 459, 15 L.R.A.(N.S.) 812, 14 Ann. Cas. 66. The law imposes this duty to warn on the master absolutely for the protection of the servant from injury, and he must either perform it personally or see that it is performed by a representative. 2 Dunnell, Minn. Dig. § 5868. That these blasting operations involved risks beyond those assumed by plaintiff, increased them, and rendered the performance of his duties extra-hazardous, is self-evident; and the extensive and protracted nature of the contractor's work, the measures taken by defendant to prepare for it, the frequency of explosions, and the extent to which debris was scattered thereby, must be held sufficient at least to sustain a finding charging defendant with notice not only of the operations themselves, but of the manner in which they were conducted. The court properly submitted the issue of negligence so made to the jury.

2. Were the proofs sufficient to uphold the finding of the jury that defendant's omission to warn plaintiff was the proximate cause of his injury? Defendant contends: "Plaintiff's work required him to be on or about the semaphore pole at the time of the accident.

A general warning would avail nothing. Had he been aware of the blasting, he would still have been obliged to rely upon being notified from time to time of the intention to fire a blast." This proposition wholly ignores the fundamental basis of the duty to warn. In a recent Wisconsin decision it is said:

"There always may be latent dangers attendant upon the usual conduct of a business of whose existence it is the duty of the master to warn the servant so that the latter can decide for himself, after being so warned, whether or not he will assume them by remaining in the employment." *Ruck v. Milwaukee Brewery Co.* 144 Wis. 404, 129 N. W. 414. See also *Boin v. Spreckles Sugar Co.* 155 Cal. 612, 102 Pac. 937.

So in the present case, plaintiff should have been warned before being sent to this place of danger, in order that he might have elected whether to remain in or quit the employment. No such alternative was given him at any time. Had he received such warning its effect would have been material only upon assumption of risk or contributory negligence.

Plaintiff testified:

"Q. Had you known that the defendant company, or any of its officers, warned or notified you that they were using powder or dynamite down in that vicinity what would you have done?

"A. I would have went to those men and told them to notify me in case blasting was going to be done.

"Q. Had you known there was blasting going to be done there, would you have remained upon that semaphore pole?

"A. No, sir; I would not."

Upon this testimony, and mainly upon statements of principles excerpted from 2 Dunnell, Minn. Dig. § 7000, defendant insists that "plaintiff's injury was a direct consequence—not of his ignorance of the blasting operations in general, not of defendant's failure to warn him concerning the same—but solely of the failure on the part of Baxter's men in charge of the blasting to notify him that the particular charge by which he was injured was about to be fired. And therefore defendant, though failing to warn plaintiff of the blasting, is not the cause of, nor answerable for, his injury." Thus,

in effect, we are asked to hold as a matter of law that defendant, notwithstanding its neglect of duty, is not liable, because plaintiff testified that, had he known of the blasting operations, he would have taken one of the obviously necessary steps to protect himself, assuming, of course, that he would not have quit the employment. Such a result would, as we have indicated above, have to be reached, if at all, under the doctrine of assumption of risk or contributory negligence, which, in view of the absence of any warning or notice to plaintiff from any source, cannot here be invoked. Would it not follow, by parity of reasoning, if defendant prevails in this contention, and plaintiff should subsequently sue the subcontractor, and on the trial testify that had he been warned by defendant he would have refused to go to the semaphore pole, defendant in that action would be relieved from liability on the ground that this defendant's negligence was the proximate cause of the injury?

A holding in accordance with defendant's contention would emasculate the doctrine of duty to warn, and in the present case this would be done upon purely conjectural grounds. Plaintiff says he would have arranged for warning. What else would he have done? What kind of warning would he have demanded? Who can say that the same result would have followed had he actually conferred with the subcontractor, or that in such case he would still have been injured? Indeed, is there anything in the record reasonably tending to show that plaintiff, if he had been fully warned by defendant, would not have even quit the employment or else have refused to go to the semaphore pole in question? It should be remembered that the master's duty is not merely to advise the servant of existing conditions, but to see to it that he comprehends the risk and understands the danger. 3 Labatt, Master & S. (2d Ed.) § 1147; 1 Street, Foundations of L. L. 166-169. As said in *The Magdaline*, 91 Fed. 798, 800, quoted with approval in *Thomas v. Wisconsin Central Ry. Co.* 108 Minn. 485, 489, 122 N. W. 456, 23 L.R.A. (N.S.) 954:

"A master may not place his servant at a work made dangerous by the nature of the work of other servants, or persons performing work under contract, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the

negligence of a coservant or third person employed on the premises, the injury would not have happened. A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or of any independent contractor."

The case under consideration is analogous to one involving violation of a statutory duty as negligence, of which it has been said:

"Where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent." *Perry v. Tozer*, 90 Minn. 431, 438, 97 N. W. 137, 140, 101 Am. St. 416.

No distinction can be drawn between the effect, in this connection, of breaches of common law and statutory duties, and an imputation of causal connection in such cases cannot be destroyed by mere speculation or conjecture. Aside, then, from the question of whether the subcontractor's negligence is to be deemed an independent, intervening cause, we think it clear that the jury were justified in finding plaintiff's injury to be a consequence which followed in natural sequence from defendant's negligence, which latter, therefore, must be held to be the proximate cause thereof. *Christianson v. Chicago, St. Paul, M. & O. Ry. Co.* 67 Minn. 94, 97, 69 N. W. 640; *Wallin v. Eastern Ry. Co. of Minn.* 83 Minn. 149, 157, 86 N. W. 76, 54 L.R.A. 481.

3. Were plaintiff's injuries due to the interposition of an entirely independent and unrelated cause, sufficient of itself to stand as the cause of the mischief? See 2 *Dunnell*, Minn. Dig. § 7000, relied on by defendant. Such a cause must be one which not only comes between the original cause and the injury in point of time, but must turn aside the natural sequence of events and produce a result which would not otherwise have followed. *City of Winona v. Botzet*, 169 Fed. 321, 329, 94 C. C. A. 563, 23 L.R.A.(N.S.) 204. Or, as stated by Gilfillian, C. J., in *Purcell v. St. Paul City Ry. Co.* 48 Minn. 134, 138, 50 N. W. 1034, 16 L.R.A. 203:

"The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and

adequate to bring about the injurious results. Whether the natural connection of events was maintained or was broken by such new, independent cause, is generally a question for the jury." See also *Illinois Cent. R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L.R.A.(N.S.) 819, 11 Ann. Cas. 368; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

How can it be said that failure of the excavation workmen to notify plaintiff interrupted the natural sequence of events beginning with defendant's neglect of duty or checked the causal momentum of its negligence? Did the intervening circumstance produce a result which would not otherwise have followed? Plaintiff would have been injured just the same, if the excavation workmen had been ignorant of his presence. How, then, can their knowledge and futile attempt to warn him constitute a breaking of the causal sequence? True, he might not have been injured had he received warning of the particular blast in question; but this, at most, would bring the case within the rule relating to mere incidents in the natural sequence from the first wrongful act, or else within the doctrine of concurrent negligence, neither of which would relieve the original wrongdoer. See *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 137. Viewed as an incidental matter, the subcontractor's negligence was a mere failure to interrupt the natural course of events started by defendant's putting plaintiff at work on the semaphore pole without warning as to surrounding conditions. *Moon v. Northern Pac. R. Co.* 46 Minn. 106, 48 N. W. 679, 24 Am. St. 194; *Teal v. American Mining Co.* 84 Minn. 320, 87 N. W. 837; *Board of Co. Commrs. of Ramsey County v. Sullivan*, 94 Minn. 201, 206, 102 N. W. 723; *Thomas v. Wisconsin Central Ry. Co.* 108 Minn. 485, 489, 122 N. W. 456, 23 L.R.A.(N.S.) 954; *Neidhardt v. City of Minneapolis*, 112 Minn. 149, 127 N. W. 484. Considered otherwise, the negligence of defendant and that of the subcontractor constituted contributing causes of the injury, for which, therefore, plaintiff "may recover damages from the one guilty of the first wrong, notwithstanding the succeeding negligence of the other united in producing" it. See concurring opinion of Mitchell, J., in *Martin v. North Star Iron Works*, 31 Minn. 407, 410, 18 N. W. 109. See also *Johnson v. Northwestern Tel. Exch. Co.* 48 Minn. 433, 51

N. W. 225; *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567; *Moon v. Northern Pac. R. Co.* supra; *Teal v. American Mining Co.* supra; *Butler-Ryan Co. v. Williams*, 84 Minn. 447, 453, 88 N. W. 3; *Coleman v. Minneapolis St. Ry. Co.* 113 Minn. 364, 129 N. W. 762; *Froeborg v. Smith*, 106 Minn. 72, 75, 118 N. W. 57; *Landry v. Great Northern R. Co.* 152 Wis. 379, 140 N. W. 75, 77; 36 Am. St. 845, note.

4. What has been said in the first subdivision of this opinion disposes of defendant's contention that the court erred in giving the following instruction, the portion thereof particularly objected to being italicised:

"It is for you to find whether the defendant, knowing what it did about the Soo work being done, *the manner in which it was being carried on*, and of its dangers to the men on the road, was negligent in failing to give the plaintiff a warning or information as to the blasting before putting him at his particular work." No objection or exception was taken on the trial; and if defendant desired the jury's attention called to the distinction between notice and knowledge, request should have been made.

5. The verdict returned was for \$11,375, which was reduced by the trial court to \$9,000. It is claimed that this was so excessive as to indicate passion or prejudice; and further, that as reduced the verdict is still excessive. The accident caused loss of sight in one eye, fracture of the jaw bone, permanent disfigurement of the face, the teeth remaining out of alignment and pain being suffered a year after the accident and up to the time of trial, and usual physician's expenses and loss of time ensued, but no decrease in earning capacity. No arbitrary standard can be fixed for measuring damages for such injuries. Intelligent jurymen might easily differ in arriving at a compensatory sum, and we find nothing to indicate passion or prejudice. Whether the verdict as reduced should be sustained depends largely upon whether the trial court abused its discretion in the matter. *Gibson v. Chicago Great Western R. Co.* 117 Minn. 143, 148, 134 N. W. 516, 38 L.R.A.(N.S.) 184, Ann. Cas. 1913C, 1263. We find no ground for interference.

Order affirmed.



**W. E. DAVIS and Another v. JAMES FORRESTAL and Others.<sup>1</sup>**

December 12, 1913.

Nos. 18,239—(85).

**Injunction against subcontractors to avoid multiplicity of suits.**

The contractors for the construction, under the drainage statutes, of a judicial county ditch and their surety who have been sued by the subcontractors for a balance due, bring this action against the subcontractors, the latter's surety, the county, and two owners of land adjacent to the ditch, who have threatened to sue plaintiffs for flooding their lands, to enjoin the subcontractors and each defendant from maintaining or bringing any action against plaintiffs on account of the ditch construction and to have the various claims of the parties determined, alleging that the failure of the subcontractors to complete their contract is alone the cause of the injury to the landowners. *Held:*

(1) The contractors do not show irreparable injury nor that their remedy at law is inadequate nor does the plaintiff surety show any cause of action.

(2) The sole ground for enjoining defendants from suing being to avoid a multiplicity of suits, the court may consider the number of suits which may be avoided, the statutory provisions for reducing this number, the efficiency of such provisions for giving plaintiffs adequate relief, the convenience and pecuniary loss of the parties, the apparent as well as anticipated issues between the different parties, and the importance of preserving to each the right of a jury trial in determining whether jurisdiction should be entertained or refused.

(3) When the rights of plaintiffs as to the different defendants and the rights of the latter as between each other are considered, it is clear that, even though the different rights may grow out of the same act, the issues of law and fact arising therefrom as between the individual parties are not the same, and equity should not assume jurisdiction in purely legal controversies based on such varied rights.

(4) A different rule applies where a plaintiff has an equitable cause of action, for where equity jurisdiction attaches as a matter of right, the claims of all proper parties to the suit will be adjusted notwithstanding that such claims constitute actions at law triable to a jury.

(5) The court under the allegations of the complaint being justified in refusing to entertain the action at all, clearly did not abuse its discretion in denying the application for temporary injunction.

<sup>1</sup> Reported in 144 N. W. 423.

Motion in the district court for Wabasha county by W. H. Davis and George W. Redmon and The Massachusetts Bonding & Insurance Company, plaintiffs, for a temporary injunction to restrain James Forrestal and Nicholas Feyen, as copartners, The Title Guaranty & Surety Company; the county of Wabasha, Simon Braun, Sarah Schurhammer and Joseph Schurhammer from commencing or maintaining any action against plaintiffs upon the transactions set forth in the attached complaint, to restrain defendants Forrestal and Feyen from taking any further proceedings in an action commenced by them against plaintiffs in the district court for Ramsey county, excepting the dismissal of such action. Plaintiffs obtained an order directing defendants to show cause why the motion should not be granted and the injunction issue. The order was heard before Snow, J., who denied the motion. From the order denying the motion, plaintiffs appealed. Affirmed.

*Brown & Guesmer*, for appellants.

*Boyesen & Flor, J. E. Cowern, Hiram D. Frankel and Michael Marx*, for respondents.

HOLT, J.

Appeal by plaintiffs from an order refusing a temporary injunction. The facts in brief are these: On August 16, 1909, the county of Wabasha made a contract with plaintiffs Davis & Redmon, partners, under which, for a stipulated price, the latter agreed to construct judicial ditch No. 1 in said county and the plaintiff surety company, a corporation, became the surety on the statutory bond given to the county by Davis & Redmon for the faithful performance of the contract. Davis & Redmon on March 17, 1911, sublet the construction of about one-half of the ditch to defendants Forrestal & Feyen, the defendant Title Guaranty and Surety Company becoming surety for their performance of the subcontract, and the plaintiff corporation becoming surety on a bond given by Davis & Redmon to Forrestal & Feyen to secure the payment of the moneys to be earned under the subcontract. Some time prior to the commencement of this action Forrestal & Feyen began an action in the district court of Ramsey county to recover from the plaintiffs herein

the sum of \$1,500 claimed to be the balance due on the ditching contract of March 17, 1911, and when the same was about to be reached for trial the defendants therein, the plaintiffs herein, brought the present action in Wabasha county making Forrestal & Feyen, their surety, the county of Wabasha, and two separate owners of land adjacent to the ditch defendants.

The complaint sets forth the above facts and also that there would have been due Davis & Redmon from defendant county about \$3,200 had Forrestal & Feyen completed the subcontract, which sum the county refuses to pay solely because of the failure of the subcontractors to complete their part of the ditch. It is also alleged that defendants Braun and Schurhammer each own tracts of land adjacent to the ditch which each claims to have been flooded by reason of the improper work of the subcontractors, and that these land-owners threaten to sue plaintiffs for damages. Numerous and varied allegations abound in support of the conclusion that the rights and liabilities of the plaintiffs and the different defendants grow out of and depend on the single fact of the failure of the subcontractors to construct their part of the ditch according to their contract. The usual averments of irreparable injury, inadequate remedy at law, and a multiplicity of suits are found. The contract, subcontract, and the three bonds mentioned are made part of the complaint. In the prayer for relief, the court is asked to determine the claims of the respective parties and give judgment for or against them as the facts and the law shall be found to require for a determination of the entire controversy; to issue an injunction perpetually enjoining and restraining Forrestal & Feyen from proceeding in their Ramsey county action, except by a dismissal, and perpetually enjoining each and all of the defendants from beginning or maintaining any action against plaintiffs based upon the facts stated in the complaint; and to issue a temporary injunction of the same tenor during the pendency of the action. The court on plaintiff's application ordered defendants to show cause why the temporary injunction as prayed for should not issue, and restrained Forrestal & Feyen from proceeding in the Ramsey county action until the hearing upon the order to show cause. On the hearing the order to show cause was dis-

charged and the temporary restraining order vacated. This appeal followed.

It is plain that plaintiffs will suffer no irreparable injury from the acts of defendants, done or threatened, for which there is not an adequate remedy at law. The plaintiff surety is in no position to bring the action, for it has paid nothing on the bond and stands in no position to ask for contribution or release; it surely stands in no better position to ask equitable relief than do its principals Davis & Redmon. The latter confess that they have not fulfilled their contract with the county, hence have no cause of action against it and, what is more, their conduct towards the county with reference to this ditch is so inequitable that that alone should bar them from equitable relief. With respect to the county plaintiffs were in duty bound to see to it that the ditch was dug according to contract. The failure of a servant or subcontractor of theirs to perform is no excuse. If these have gone wrong or failed in some respect, plaintiffs should rectify the same before troubling the county with a lawsuit. The county has no contractual relation with Forrestal & Feyen. Against Forrestal & Feyen plaintiffs have an adequate remedy at law if it be true that the subcontract is unfinished. Also, if Davis & Redmon have suffered any damages by the reason of the subcontractors' default, such as expenditures for properly completing the subcontract and loss from payment of damages for delay, as stipulated in their contract with the county, proper counterclaims may be asserted in the action pending in Ramsey county or plaintiffs may bring separate action therefor. It is not alleged that either Forrestal & Feyen, or their surety company, is insolvent, or likely to be, and if, perchance, the two defendants who own lands adjacent to the ditch should sue plaintiffs on their bond to the county, no reason is apparent why plaintiffs may not by appropriate steps protect themselves against irreparable injury, if damages are awarded because of the subcontractors' breach of contract or wrongs in the construction of the ditch. The claim that a jury in one case may not find the determinative facts the same way as a jury in another case is not a ground for equitable intervention and does not come under the definition of irreparable injury or inadequate remedy at law.

It remains to be seen whether the present suit comes properly within equity cognizance because it avoids a multiplicity of suits. Efforts have been made by textwriters to classify equitable actions and in general language define each class. Pomeroy in his *Equity Jurisprudence* divides such actions into four classes. Plaintiffs confessedly do not bring themselves within any of these, unless it be the fourth class as defined and expounded in sections 269 and 274 of said work. In section 269 the test for suits under the fourth class is thus stated: "Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." And in section 274 a further subdivision of the fourth class is attempted, wherein it is asserted as fully settled that jurisdiction in equity has been assumed. Plaintiffs assert their right to maintain this action within the rule of this subdivision: "In suits by a single party against a number of persons to restrain the prosecution of simultaneous actions at law brought against him by each defendant, and to procure a decision of the whole in one proceeding, where all these actions depend upon the same questions of law and fact."

It is extremely difficult to classify all equity cases and define in general terms each class. Novel situations may give rise to equitable interference. If it be held that a plaintiff can maintain a suit in equity to restrain a number of defendants from bringing actions at law by simply alleging that in the pending, or threatened, actions the result in each will depend on the same questions of law and fact, actions at law with its right of jury trial will almost be abolished. In *Mechanics Ins. Co. v. C. A. Hoover Distilling Co.* 173 Fed. 888, 97 C. C. A. 400, 32 L.R.A.(N.S.) 940, plaintiff, a fire insurance company, brought suit against a policyholder which had sustained a loss, joining a large number of insurance companies which had issued concurrent policies on the property destroyed, to enjoin the policyholder from proceeding in his actions at law. The court refused to entertain the suit, saying [at page 890]: "If the bill in this

case states a cause of action cognizable in equity, it is plain that the days of jury trials in insurance cases are numbered." And we may add that if the present case is entertained jury trials will be eliminated in all cases of building or construction work where a subcontractor is to be found. The assertion that some subcontractor has failed to perform would be sufficient excuse for equity to interfere with any action at law and compel an accounting between the owners, contractor and subcontractors and others who claim to have been damaged through the same default. There are cases which sustain the general language of Pomeroy to the full (*Southern Steel Co. v. Hopkins*, 157 Ala. 175, 47 South. 274, 20 L.R.A.[N.S.] 848, 131 Am. St. 20, 16 Ann. Cas. 690) wherein separate actions at law for damages for wrongful death of 110 persons in a mine disaster were enjoined on the ground of avoiding a multiplicity of suits. But this decision is overruled in *Roanoke Guano Co. v. Saunders*, 173 Ala. 347, 353, 56 South. 198, 35 L.R.A.(N.S.) 491.

It is perhaps needless to observe that a broad statement used by a textwriter is often limited by the cases cited and modified or explained by other portions of the work itself. Thus, *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763, (cited as supporting section 269), an action to enjoin defendants from doing acts which, though done by them independently, resulted in the nuisance complained of, appears to be a clear case of equity jurisdiction and does not assist plaintiffs in the case at bar. *Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L.R.A. 514, involved the adjustment of at least 3,000 policyholders' rights in an insolvent insurance company and comes plainly within equity jurisdiction both as generally understood and as provided by the Iowa statute. *Board of Supervisors v. Deyoe*, 77 N. Y. 219, concerned the application of an insufficient fund among a number of persons claiming the right thereto. Added or interpolated sections in the third edition of Pomeroy's *Equity Jurisprudence* limit and explain the rule in sections 269 and 274. Thus in section 251½ it is stated: "The equity suit must result in a simplification or consolidation of the issues; if, after the numerous parties are joined, there still remain separate issues to be tried between each of them and the single defendant or plaintiff,

nothing has been gained by the court of equity's assuming jurisdiction." *Tompkins v. Craig*, 93 Fed. 885; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380; *Van Auken v. Dammeier*, 27 Ore. 150, 40 Pac. 89; *Webb v. Parks*, 110 Ga. 639, 36 S. E. 70.

Then again the right to jury trial should not be interfered with by an assertion of doubtful equity jurisdiction. Statutory provisions of interpleader, intervention, consolidation of suits and bringing in additional parties are all in aid of the efficiency of the remedy afforded by the ordinary action at law. These may be considered in determining whether a suit in equity to restrain actions at law should be entertained. We think this is well stated in section 251 $\frac{1}{2}$  of the text-book referred to: "Since the existence or exercise of the jurisdiction, in classes third and fourth, depends on defects in the legal rules as to joinder of parties, where the legal remedy is not thus defective but permits the joinder of numerous parties or consolidation of the numerous suits, equity will not take jurisdiction for the purpose of awarding substantially the same relief that may be obtained at law." The author of the note to *Southern Steel Co. v. Hopkins* in 20 L.R.A.(N.S.) 848, states, upon the authority of numerous cases cited, that the tendency of courts is to exercise discretion in assuming jurisdiction when it is invoked solely to avoid a multiplicity of suits. The convenience of parties and the injury to either by assuming or refusing jurisdiction is to be considered. And to a great extent the discretion is controlled by the question whether a party is deprived of his constitutional right to a jury trial. This is properly placed, we think, above any consideration of convenience or possible pecuniary loss.

In view of the situation of the parties, their legal remedies in actions at law, the undoubted right of each to a jury trial, the limited number of suits necessary to settle the controversies involved, and the different facts that would go to measure the damages between the different litigants even on plaintiff's showing, to say nothing of the issues that might be anticipated from the defendants, all convince us that the court below was entirely right in refusing to take cognizance of the case. The following cases support this view: *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47, which contains an

exhaustive review of the authorities; *Tribetts v. Illinois Cent. R. Co.* 70 Miss. 182, 12 South. 32, 19 L.R.A. 660, 35 Am. St. 642; *Booneville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Scruggs & Echols v. American Cent. Ins. Co.* 176 Fed. 224, 100 C. C. A. 142, 36 L.R.A.(N.S.) 92; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 132; *Illinois Steel Co. v. Schroder*, 133 Wis. 561, 113 N. W. 51, 14 L.R.A.(N.S.) 239, 126 Am. St. 977. In the last-named case there is a dissenting opinion which, however, does not sustain appellants upon the facts here presented. Although the Alabama court has overruled the decision in the *Tribetts* case in *Gulf & Ship Island R. Co. v. Barns*, 94 Miss. 484, 510, 48 South. 823, the principles applied in the last-mentioned division demonstrate that plaintiffs in the case at bar have no standing in a court of equity.

That the rights of the parties do not depend upon the same state of facts and law appears clear when we consider that the county can look only to plaintiffs for completion of the ditch. *Forrestal & Feyen* have no recourse to the county, even if they have fully performed the subcontract. The landowners if damaged may sue on plaintiffs' bond, or may sue the one responsible for tort, but in no event could they sue the county, for in the construction of ditches it acts merely as a governmental agency. Certainly this situation involves the application of different legal principles to the rights of each litigant as well as the ascertainment of facts not common to all.

Of course what is said above has no application when a plaintiff has in part, at least, some equitable cause of action or ground upon which affirmative relief may be predicated, for, where equity jurisdiction once attaches, full and complete adjustment will be made of the rights of all parties properly in the suit, regardless of the fact that some of them may have the right to a jury trial as to their individual cause of action. The plaintiff contractors have certainly no equitable ground to relief, nor has the plaintiff surety company, for no facts are pleaded which entitle it to contribution, release or any other relief. In fact, the contractors and their surety, the plaintiffs herein, are in default, for it was their business to see that the ditch was finished if the subcontractors in any manner failed.

But the appellants rely on two decisions of this court: *City of*



Albert Lea v. Nielsen, 83 Minn. 246, 86 N. W. 83, and Fegelson v. Niagara Fire Ins. Co. 94 Minn. 486, 103 N. W. 495. In the first case, also reported in 80 Minn. 101, 82 N. W. 1104, 81 Am. St. 242, the plaintiff set up facts showing that the defendants had begun separate actions against plaintiff for damages, because a dam maintained by plaintiff at the outlet of a lake flooded their lands, and that by certain acts of the defendants and their grantors performed "simultaneously and jointly" the city had acquired the right equitably to maintain this dam at a certain height. It will thus be seen that the city pleaded facts which entitled it to maintain an action against each defendant for affirmative equitable relief. This relief was the same as to each and sprung from their joint acts or separate acts done in furtherance of a joint purpose. It was held that a demurrer on the ground that the complaint did not constitute a cause of action was properly overruled, and under that situation it was not error for the court to grant a temporary restraining order against proceeding in the actions at law until the determination of the suit in equity. It seems plain that the principles involved in that case are not applicable to the case at bar. Here there is not a shadow of a case made out against the county, nor any affirmative defense against the landowners' claims for damages. In the second case a demurrer for misjoinder of causes of actions was interposed to the complaint. The action was to recover for a partial fire loss covered by policies issued to plaintiff by the several defendants, each policy contained the standard provision to prorate with prior and subsequent insurance, except in case of total loss. It was held that the demurrer was rightly overruled. The loss being partial it seems clear that under the very terms of the policies one action was proper and, if separate actions had been commenced, any defendant would have been entitled to an order consolidating them for trial. It is not apparent that the action was changed into an equity suit so as to deprive any one of the right to a jury trial.

If, when the equity jurisdiction is invoked solely on the ground that thereby a multiplicity of suits will be avoided, the court, as indicated in the foregoing, may to a certain extent exercise discretion in entertaining the suit, it is certainly well settled that on an appli-

cation for a temporary injunction pending suit the order will not be reversed unless an abuse of discretion is apparent. Clearly there was no abuse of discretion here. By their own showing plaintiffs have no ground for affirmative equitable relief against either the county or landowners. Towards those defendants they have not done either what law or equity demands, and as to defendants Forrestal & Feyen plaintiffs' remedy at law appears adequate without restraining the action pending in Ramsey county.

Order affirmed.

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## FREDERICK FALKENBERG v. BAZILLE & PARTRIDGE.<sup>1</sup>

December 12, 1913.

Nos. 18,303—(148).

### Facts of case.

1. Plaintiff was in the employ of defendant as painter and decorator. He used a scaffold, consisting of a plank stretched upon ladders. Planks and ladders were furnished by defendant. There is evidence that in the course of the work it became necessary to use a plank of different length from any that had been furnished, and that defendant directed plaintiff's foreman to go to an employee of defendant in charge of another job and that such employee would furnish one. The foreman acted accordingly and the plank was so furnished. It was unfit for the purpose by reason of a knot near the center. This knot was somewhat obscured by lime, plaster and dirt.

<sup>1</sup> Reported in 144 N. W. 431.

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Note.—On the question of nondelegable duties as to defects in scaffolds, platforms, etc., see note in 54 L.R.A. 69, 77.

As to servant's assumption of obvious risks of hazardous employment, see note in 1 L.R.A.(N.S.) 272. And for servant's assumption of risk of danger imperfectly appreciated, see note in 4 L.R.A.(N.S.) 990. And upon the assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see note in 28 L.R.A.(N.S.) 1250.

**Absolute duty of master.**

2. The duty of defendant to furnish suitable plank for scaffolding was absolute, and could not be delegated. The evidence is sufficient that this plank was, in contemplation of law, furnished by defendant, and that defendant was negligent in not furnishing a suitable plank.

**Assumption of risk — test — question for jury.**

3. The question of whether plaintiff assumed the risk of the use of this defective plank was for the jury. The test is whether the defect was known to, or plainly observable by him, and whether he understood, or by the exercise of ordinary observation ought to have understood, the risk incident to its use. In view of the manner in which this defect was obscured by lime, plaster and dirt, the question of assumption of risk was one of fact.

**Contributory negligence — question for jury.**

4. The question of his contributory negligence was also for the jury.

**Verdict not excessive.**

5. The injury was a compound dislocation of the left ankle joint, with a fracture of the tibia. Three operations under an anesthetic were necessary. The leg is shortened an inch and the foot drawn up at the heel, the bones of the foot and of the tibia are fused, and the ankle probably stiff. At the time of the trial, five and one-half months after the accident, he had but slight use of the foot, and his injury will permanently impair his capacity. He was 44 years old and earning 45 cents an hour when injured. A verdict of \$4,000 was not excessive.

Action in the district court for Ramsey county to recover \$10,000 for personal injury received while in the employ of defendant. The answer alleged that whatever injury plaintiff received was not caused by any negligent act or omission on the part of defendant but was caused by his own negligence; that the appliances and methods of doing the work were in plain view of plaintiff, and with full knowledge of the same he voluntarily entered upon the work and continued therein without objection or complaint, and he assumed all risk incidental thereto. The answer further set up that the injury to plaintiff was caused by the negligence of a fellow servant who at the time of the accident was engaged with plaintiff in the same general business of defendant and without any negligence on its part. The case was tried before Dickson, J., who denied defendant's motion for a directed verdict in its favor, and a jury which returned a verdict for \$4,000 in favor of plaintiff. From an order de-

nying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*Watson & Abernethy*, for appellant.

*James E. Markham* and *Benjamin Calmenson*, for respondent.

HALLAM, J.

The facts are in dispute, but there is evidence from which a jury might find as follows:

1. Plaintiff was in the employ of defendant as painter and decorator. He was engaged in painting the walls and ceilings of a residence. One Lucci was working with him and was foreman of the job. In the course of the work they used a simple scaffold, consisting of a plank resting upon two step ladders. The necessary planks and step ladders were furnished by defendant, and the planks furnished for this job were 14 and 16 feet in length. By and by they reached a part of the work that necessitated an 8-foot plank. No plank of that length had been furnished, and there was testimony that it was not customary to cut long planks for such purpose. Lucci accordingly called at defendant's shop one morning on his way to work and told one Shelgren, the man in charge of such matters, to send up an 8-foot plank. He promised to do so. When the men were ready to use the 8-foot plank Lucci found it had not been sent up. Thereupon he called Shelgren by telephone and asked about it. Shelgren said "they must have forgot it \* \* \* but you can go across the street. Larson has planks over there. \* \* \* Whatever you need, go over there, 8-foot plank, and get it." Larson was another employee of defendant in charge of another job. Thereupon Lucci and plaintiff went across the street. Lucci asked Larson for an 8-foot plank, and Larson furnished him one. Larson had been using it in a scaffold built under a gable and at the time Lucci came it was lying on a scaffold nearer the ground. There is evidence that this plank was furnished to Larson by defendant. So far as appears, this was the only 8-foot plank Larson had. Lucci tested the plank before using it. Plaintiff's witnesses testified that to all appearances it was sound and of the same character as the plank they were accustomed to use. In fact it had a knot near the center which unfitted it for

use as a scaffold. This knot was somewhat obscured by reason of lime, plaster and dirt. The plank if sound should have borne the weight of four men. In fact, while these two men were working on it, it broke in two, causing the injury complained of. Plaintiff recovered a verdict of \$4,000.

2. It was the absolute duty of defendant to furnish plaintiff and Lucci with material suitable for scaffolding. It could not delegate that duty. *Lee v. H. N. Leighton Co.* 113 Minn. 373, 129 N. W. 767; *Rihmann v. George J. Grant Construction Co.* 114 Minn. 484, 131 N. W. 478; *Reid v. Northwestern Fuel Co.* 116 Minn. 96, 133 N. W. 161. This duty was the same whether the plank was furnished to them by defendant directly from its shop or by Larson at defendant's direction, so long as plaintiff and his coworker had no choice in the matter of its selection. Its furnishing was equally the act of defendant in either case. The plank was never suitable for the purpose for which it was furnished. This case is different from the cases where ample material is furnished to employees from which to make a selection, and in the course of their work they themselves, or their fellow servants, select improper material. *Fraser v. Red River Lumber Co.* 45 Minn. 235, 47 N. W. 785; *Oelschlegel v. Chicago G. W. Ry. Co.* 73 Minn. 327, 76 N. W. 56, 409. Neither are we concerned with any question of the duty of employers to make inspection of material from time to time during the progress of the work, as in *O'Brien v. Northwestern Con. Milling Co.* 119 Minn. 4, 137 N. W. 399. This plank was not suitable for the work when furnished to these men in the first instance. The evidence as to negligence of defendant is sufficient to sustain the verdict.

3. The question whether plaintiff assumed the risk of using this defective plank was one of fact for the jury. The principles governing assumption of risk are so well settled by repeated decisions in this state that we need go no further for authority. A servant assumes the risks ordinarily incident to the employment in which he is engaged. If he freely and voluntarily encounters a risk, he has only himself to thank if harm comes. He also, in some cases, assumes the risk incident to use of defective instrumentalities if he acquiesces in their use, even though their use has been imposed upon him through

the negligence of his employer. He does assume such risk when he knows or ought to know the actual character and condition of the defective instrumentality and when he also understands or, by the exercise of ordinary observation ought to understand, the risks to which he is exposed by its use. *Russell v. Minneapolis & St. L. Ry. Co.* 32 Minn. 230, 234, 20 N. W. 147. As concerns his knowledge of the existence of the defect, the test is found, not in the exercise of care to discover dangers; the test is whether the defect is known to him or is plainly observable by him. *Choctaw, Okla. & G. R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. ed. 96. He is not required to look for danger. He assumes the risk only when the danger is so obvious that one who owes no duty to inspect was bound to discover it. As to appreciation of the risk, as distinguished from knowledge of the physical facts and conditions, the question is, did he understand the risk to which he was exposed, or ought he, by the exercise of ordinary observation, to have understood it. *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.* 107 Minn. 260, 120 N. W. 360, 21 L.R.A.(N.S.) 138.

Applying these principles to the evidence in the case as it is above recited, we cannot hold as a matter of law that plaintiff assumed the risk incident to this defective plank. The plank was covered with more or less lime, plaster and dirt, and the question whether the defect was known or was obvious to him was one of fact.

4. It also contended that plaintiff was guilty of contributory negligence. The determination of this question in this case involves a consideration of much the same facts as are involved in determining the question of assumption of risk. Yet the two questions are different. The question of contributory negligence is wholly a question whether plaintiff exercised the care of an ordinary prudent man in observing or failing to observe the condition of this plank, and in the manner in which he used it. This was a question of fact for the jury. While plaintiff was an experienced workman, he was not held to the same duty of inspection of material furnished for his use as was his employer. Inspection was not in the particular line of his duty. He had a right to assume that his employer had acted with due care in selecting material suitable for the purpose in hand (Lee

v. H. N. Leighton Co. 113 Minn. 373, 129 N. W. 767,) unless he knew, or was chargeable with knowledge that his employer had not performed this duty. *Anderson v. C. N. Nelson Lumber Co.* 67 Minn. 79, 82, 69 N. W. 630.

5. The damages are not excessive. There was a compound dislocation at the left ankle joint, with a slight fracture of the lower end of the tibia, the bones of the leg protruded through the skin, and the foot turned to the inner side of the leg. Three operations were necessary, all under an anesthetic. The leg and foot were in a cast for about two months. Plaintiff was in bed six weeks or two months. At the time of the trial, five and one-half months after the accident, he was not able to bear weight upon the leg except in a very slight degree. The ankle joint is probably permanently stiff, and the bones of the foot and the bone of the tibia are fused. He may eventually be able to bear his weight upon the foot with some support about the ankle. He is partially incapacitated from such work as climbing ladders. The leg is apparently shortened about an inch, and the foot is drawn up at the heel. Plaintiff was 44 years old and earning 45 cents an hour when injured.

Numerous exceptions are taken to the charge of the court and to the refusal of the court to charge in accordance with certain requests of defendant. It is not necessary to review them in detail. We have examined these with care and have concluded that they present no reversible error. The charge fully and fairly submitted the case to the jury.

Order affirmed.

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HENRY RUDOLPHI and Another v. JOSEPH A. WRIGHT  
and Another.<sup>1</sup>

December 12, 1913.

Nos. 18,311—(133).

**Fraudulent representations — evidence.**

1. The evidence is examined and held to justify a finding of the trial

<sup>1</sup> Reported in 144 N. W. 430.

court that the plaintiff was induced by the fraudulent representations of the defendant to execute a deed upon an exchange of lands.

Same.

2. The fact that the plaintiff saw the lands before he traded is not conclusive against him on the issue of fraud.

New trial.

3. Certain irrelevant evidence offered by the plaintiff held not to be prejudicial so as to require a new trial.

Action in the district court for Brown county to cancel a deed and to adjudge plaintiffs to be the owners in fee simple of the land described therein. The answer set up that the transaction between the parties was completed by the execution and delivery of the deeds by each to the other; that plaintiffs acquiesced in the transaction for more than six months before beginning the action and that they are concluded from prosecuting it by their laches. The answer also alleged that at the time of the exchange plaintiffs had full knowledge of the land conveyed to them. The case was tried before Olsen, J., who made findings and ordered judgment in favor of plaintiffs and against defendant Wright. The separate motions of defendants for judgment notwithstanding the findings or for a new trial were denied. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

*Reed & Swift and Charles B. Elliott, for appellant.*

*Somsen, Dempsey & Mueller, for respondents.*

DIBELL, C.

This action is brought to cancel a deed conveying certain property in the city of New Ulm, made by the plaintiffs to the defendant Joseph A. Wright, upon the ground of fraud. The deed was given upon an exchange of New Ulm city property for Wisconsin lands. The court found for the plaintiffs and the defendants appeal from the judgment. Henry Rudolphi and Joseph A. Wright are the two active parties, the other two being their respective wives.

1. The evidence sufficiently supports the finding of the trial court that the deed made by the plaintiffs was procured by fraud. The New Ulm property was the homestead of the plaintiffs, was worth \$6,000, and was income bearing. It was traded for 621 acres of unimproved, cut-over, sandy and swampy lands in Wisconsin. The



court found that the Wisconsin lands were not worth more than three dollars per acre. Some of the witnesses put the value much higher, as high as \$10 or \$12 per acre. The court was justified in finding that they were substantially worthless except for trading purposes. The defendant had traded gold stock for them. The court was justified in finding that the defendant fraudulently misrepresented the value, character and quality of the lands, and that he fraudulently pointed out the boundaries of the lands and that the plaintiff relied upon the misrepresentations made.

2. The plaintiff went to the lands and made some examination of them. With him was the defendant, and Henry A. Rudolphi, the plaintiff's nephew, who was instrumental in bringing the plaintiff and the defendant together and who was to have a commission from the defendant. Young Rudolphi rather discouraged a thorough examination. The fact that a purchaser of land makes an examination of it before purchase does not necessarily preclude him from claiming fraud and a reliance upon it. His making of an examination is a circumstance to be weighed carefully by the trial court in determining whether fraud was practiced, and, if so, whether the purchaser relied upon fraudulent representations; but it does not, of itself, prevent a finding of fraud. *Brown v. Andrews*, 116 Minn. 150, 133 N. W. 568; *Schmeisser v. Albinson*, 119 Minn. 428, 138 N. W. 775.

3. The plaintiffs at one time in the trial digressed from the real issues in the case and engaged in a useless investigation of some transactions which the plaintiff and young Rudolphi had relative to the exchange of the New Ulm property for lands in the Canby country, and for what special purpose is not plain. In the course of the investigation the testimony of what the plaintiff and young Rudolphi said and did was received. After a serious consideration we reach the conclusion that their digression did not result in reversible error.

The record contains more than 900 pages of printed matter. We have all given it a patient and thorough examination, as well as the briefs of counsel, and we find nothing justifying us in disturbing the conclusions of the trial court. A review of the evidence would extend the opinion beyond endurable length without profit.

Order affirmed.

**LELAH McALLISTER and Others v. ARTHUR H. ROWLAND.<sup>1</sup>**

December 12, 1913.

Nos. 18,323—(127).

**Will — evidence of incapacity.**

1. Where the issue is the mental capacity of a testator at the time of making a will, evidence of incapacity within a reasonable time before and after is relevant and admissible.

**Incompetent person — evidence of mental condition.**

2. A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent.

**Same.**

3. When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove the fact at issue. It stands on the same basis as would other evidence of the mental condition of the testator at a subsequent time. Whether it has probative value, or is too remote, is largely for the trial court to determine. In this case, the decision of the trial court that the exclusion of such judgment was prejudicial error is sustained.

**Same — appointment of guardian.**

4. That the application was not to have the testatrix declared insane, but only to have a guardian appointed because of the impairment of her mental faculties by reason of old age, and her consequent inability to manage her affairs, did not render the adjudication inadmissible.

**Same — evidence.**

5. The petition for such an adjudication is not admissible on the ground that it was made by one of the devisees, and therefore an admission against interest, when there are others financially interested in sustaining the will.

<sup>1</sup> Reported in 144 N. W. 412.

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Note.—The authorities on the general question as to what constitutes testamentary capacity are collated in an extensive note in 27 L.R.A.(N.S.) 2.

Arthur H. Rowland petitioned the probate court for Lyon county for the allowance of the last will and testament of Margaret Bullard, deceased. Lelah McAllister, Beth Bullard, Zoe Bullard and Alma Bullard filed objections to the allowance of the will. From the order of the probate court admitting the will to probate, they appealed to the district court for that county. The appeal was heard before Olsen, J., and a jury which answered in the affirmative the question whether the testator was of sound and disposing mind at the time of making the will and in the negative the question whether the will was the result of undue influence exercised upon the testator by her sister, Mrs. Thomas, or by Mrs. Cardwell or by either of them. From the order granting contestants' motion for a new trial, Arthur H. Rowland appealed. Affirmed.

*Fremont S. Brown, Knox & Faber and Charles M. Start, for appellants.*

*Albert R. Allen and O'Brien, Young & Stone, for respondent.*

BUNN, J.

April 12, 1912, Margaret Bullard, then a widow 76 years of age, made her will. She died June 9, 1912. On June 24 the will was filed for probate in Lyon county. Four granddaughters of the testatrix, the respondents here, contested the will on the ground that the testatrix was of unsound mind at the time the will was made, and on the ground of undue influence. The probate court admitted the will, and the contestants appealed to the district court of Lyon county. The issues were there tried and submitted to a jury, which, in answer to special questions, found that the testatrix was of sound and disposing mind at the time she made the will, and that there was no undue influence. The contestants made a motion for a new trial on the ground that the verdict was not justified by the evidence, and on the further ground that the court erred in excluding certain evidence. The trial court granted the motion, upon the ground, as expressly stated in its order, of "error occurring at the trial, as mentioned in the attached memorandum, and not on account of any insufficiency of the evidence to sustain the verdict." The executor appealed from this order.

The only question on this appeal is whether the trial court erred in excluding the evidence hereinafter referred to. By the will, after bequests of \$50 each to her four granddaughters, \$100 each to two nephews, and \$200 to another nephew, the testatrix devised and bequeathed all the residue of her property to her brother, Richard Rowland, of Tracy, Minnesota, and to her sister, Elizabeth Thomas, of Chicago, Illinois, share and share alike. The value of the estate was stated to be \$7,000.

On the trial contestants called Richard Rowland for cross-examination under the statute. Testatrix, who at the time of making the will, resided in Fairmont, on that day or the following went to live with her brother, Richard Rowland, in Tracy, where she continued to live until her death. The contestants offered to prove by the witness that on May 16, 1912, he made an application to the probate court of Lyon county for the appointment of a guardian of testatrix, and offered in evidence the petition. They also offered to show that in pursuance of the petition a guardian was appointed. These offers were objected to, and the evidence was excluded. The petition was signed and sworn to by Richard Rowland, the witness, and stated that Margaret Bullard "is very deaf, and is almost totally blind, and her mental faculties and ability to attend to or manage her own affairs are greatly impaired, and that by reason of the said facts she is incompetent to have the charge and management of her property or business affairs." This petition was filed May 22, 1912. It does not appear when the order appointing the guardian was made, or what was its language, but we may presume that it was made before the death of Mrs. Bullard, and that it was based on the grounds alleged in the petition. The offers were objected to, and the evidence excluded. On the motion for a new trial the court concluded that the record of the proceedings for the appointment of a guardian and the adjudication making such appointment should have been received in evidence, as throwing light upon the mental condition of the testatrix at the time the will was made. Whether or not the court was correct in this conclusion is the main question on this appeal.

The will was executed April 12, 1912. The petition for the appointment of a guardian was made by Richard Rowland on May 16,

1912, and filed May 22. The order appointing the guardian was made between this date and June 9. The petition could only be admissible on the ground that it was an admission against interest on the part of Richard Rowland, one of several beneficiaries under the will. The order or judgment, granting it to be an adjudication that Mrs. Bullard was incompetent at the time the court entered such order, spoke as of that date, or as of the time the petition was made. It clearly was not an adjudication that Mrs. Bullard was mentally incompetent at the time the will was made. Was it admissible as some evidence of her mental state on April 12?

1. It is well settled that when the issue is the mental capacity of a testator or grantor at the time of making a will or deed, evidence of incapacity within a reasonable time before and after is relevant and admissible. In *re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144. Mr. Wigmore says: "Courts are today universally agreed that both prior and subsequent mental condition, within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue. There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible. The circumstances of each case must furnish the varying criterion, and the determination of the trial judge ought to be allowed to control." 1 Wigmore, Evidence, § 233, and cases quoted in text and cited in note.

2. It is equally well settled that a judgment or order in proceedings for the appointment of a guardian of an incompetent person and taking from such person the management of his property, is admissible in evidence in any litigation whatever, but not conclusive, to prove the person's mental condition at the time the order or judgment is made or at any time during which the judgment finds the person incompetent. 3 Wigmore, Evidence, § 1671, and cases cited. *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465; *Den v. Clark*, 5 Halst. 217, 18 Am. Dec. 282; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Hill v. Day*,

34 N. J. Eq. 150; Van Deusen v. Street, 51 N. Y. 378; Willis v. Willis, 12 Pa. St. 159; Hutchinson v. Sandt, 4 Rawle, 233, 26 Am. Dec. 127; Rippy v. Gant, 39 N. C. 443.

A finding of incompetency in guardianship proceedings, or in proceedings upon a writ of *de lunatico inquirendo*, for which the guardianship proceedings are the modern equivalent, is admissible as evidence of the mental condition of the person at the time covered by such finding, notwithstanding that the parties to the litigation are different, and notwithstanding the hearsay rule.

3. Whether the person's mental condition at the time covered by the finding is evidence of his mental condition at a prior time would seem logically to be a question of the probative force or weight of the evidence, or its tendency to prove the fact in issue. It is difficult to see why the evidence should stand on any different footing than does the oral evidence of witnesses to prove the mental condition of the testator at a time after the will is made, and, as we have stated, the rule is uniform that such evidence may be received. There are, however, a number of cases that hold the finding of incompetency in the subsequent proceedings inadmissible. In *re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L.R.A.(N.S.) 174, 111 Am. St. 827; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Rippy v. Gant*, 39 N. C. 443; *Jackson v. King*, Cowen (N. Y.) 207, 15 Am. Dec. 354; *Emery v. Hoyt*, 46 Ill. 258; *Shirley v. Taylor*, 44 Ky. 99, 102; *Succession of Hébert*, 33 La. Ann. 1099; *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760. In none of these cases is the decision of the particular question fortified by either sound reasoning or authority. In some, the time was so long after the will or deed was executed that the exclusion is justified on the ground of remoteness. In others, the argument is the hearsay rule, and that the parties to the litigation are different, an argument that applies with no greater force than when the time under inquiry is covered by the finding. But in most of the cases, the evidence is excluded with the bare statement that it is incompetent, or that it proves nothing.

In the *Pinney* case, Chief Justice Gilfillan, after announcing that

evidence offered to show that the testator, after the execution of the will, and without regard to how long after, had sufficient capacity, was admissible, sustained the exclusion of the record of the probate court on an application six years after the will was executed to appoint a guardian. This record showed that the probate court found Pinney then competent. The decision is in point, but we are convinced that for once a characteristically curt statement of the law made by the great Chief Justice did not have reason and authority to back it.

In *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934, it was held that proceedings under G. S. 1878, p. 455, c. 35, § 21, to commit a person to the hospital for insane, are not evidence of his mental incapacity to make contracts. The distinction is made between such proceedings, and the common-law writ *de lunatico inquirendo*, which is stated to be not materially different from the statutory proceedings for the appointment of a guardian. The case is not in point. The soundness of the distinction is denied by Wigmore and the authorities cited by him. 3 Wigmore, Evidence, § 1671, note 4.

In the section of Wigmore just referred to, the author says that whether the person's mental capacity at the time of the inquisition is evidence of his condition at the time in issue is merely a question of the relevancy of the fact evidenced by the inquisition. In section 233, note 1, he says: "The question whether an inquisition or adjudication of insanity is admissible at all raises a question of an exception to the hearsay rule." "Supposing it admissible, then it evidences insanity at the time of the inquisition, and the present question—of the relevancy of insanity at the time—is then the same as in cases where the insanity is otherwise evidenced by conduct or the like."

In *Giles v. Hodge*, 74 Wis. 360, 43 N. W. 163, it was held that the record of a subsequent adjudication of incapacity is admissible, in connection with evidence that there had been no change in the conditions. In *Small v. Champeny*, 102 Wis. 61, 78 N. W. 407, the court holds that an adjudication of mental unsoundness is evidence only of the mental condition of the subject at the time of such adjudication, an unquestioned proposition, and upholds the rule of

*Giles v. Hodge*. The reasoning, in both cases, is the same as supports the admissibility of any other evidence of prior or subsequent mental condition.

The Iowa court considered the question in the case of *In re Van Houten's Will*, 147 Iowa, 725, 124 N. W. 886, 10 Am. St. 340. Two years after the will was executed, proceedings for the appointment of a guardian were instituted, and resulted in a judgment that the testator was then mentally competent. It was held that the record of this adjudication should have been admitted in evidence. The decision is based upon the rule that such an adjudication is evidence of the mental condition of the testator at the time of the judgment, and upon the conclusion that this has a probative value on the question of the mental condition at the time of the will.

We hold, notwithstanding the *Pinney* case, that the judgment or finding in the guardianship proceedings was competent evidence. Its admissibility depended upon whether the want of mental capacity of the testatrix in May or June had any probative value on the question of her mental capacity in April, when the will was made. If witnesses who had observed the actions of and conversed with the testatrix in June, would have been permitted to testify as to her sanity or insanity at that time, because such evidence was of probative value on the question of her mental state two months before, then the judgment or finding was admissible. In either case it is purely a question of the tendency of the evidence to prove the fact in issue. This was largely for the trial court to determine. On the motion for a new trial, it decided that the excluded evidence would have thrown some light upon the issue decided by the jury, and that the ruling was prejudicial error. The incapacity that the evidence tended to show in *Mrs. Bullard* was not a sudden attack, or a temporary condition. It was rather in the nature of mental decay. We are unable to say that the excluded evidence had no relevancy to the issue, and cannot disturb the trial court's decision that the ruling was prejudicial.

4. It is contended that because the application to the probate court was not to have *Mrs. Bullard* declared insane, but only to have a guardian appointed because of her impairment of mental faculties



by reason of old age, and her consequent inability to manage her affairs, that the adjudication was inadmissible. We do not sustain this view. Her impairment of mental faculties and inability to manage her property, while not in itself ground for invalidating her will, is evidence of want of testamentary capacity that could be considered by the jury.

5. The petition was not admissible on the ground that it was an admission against interest made by a devisee. There were others who were financially interested in sustaining the will, and it is elementary that the declarations of one of two or more legatees or devisees are not admissible as against the others.

It is urged by the appellant that the evidence overwhelmingly sustains the verdict, and by the respondent that the contrary is true. It is sufficient to say that the evidence was conflicting. It is not so clear that Mrs. Bullard was of sound mind that we can say that the excluded evidence might not affect the result.

Order affirmed.

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## STATE v. MINNEAPOLIS MILK COMPANY and Another.<sup>1</sup>

December 12, 1913.

Nos. 18,348, 18,349—(7, 8).

### **Indictment.**

1. Matters of description or inducement need not be stated with the same particularity in an indictment charging the commission of a crime, as the facts constituting the essential elements of the crime itself are required to be stated.

### **Same — combination to fix prices of merchandise.**

2. An indictment under section 5168, R. L. 1905, charging that defendants, several persons and corporations, were "jointly and severally" engaged in a certain occupation, and in violation of the statute formed a combination for the purpose of increasing the price of their products, construed and *held*

<sup>1</sup> Reported in 144 N. W. 417.

to charge that defendants were to some extent independent dealers, and not jointly associated in business as one concern.

**Construction of statute.**

3. The language of a statute is to be construed in harmony with the ordinary rules of grammar, except only when such construction will lead to a result obviously contrary to the intention of the legislature.

**Combination to fix prices — domestic corporation.**

4. For the violation of sections 5168 and 5169, R. L. 1905, by entering into a combination with others to raise the price of commodities offered for sale by those forming the combination, the domestic corporation is not subject to the penalty imposed by section 5168, but only to the penalty of forfeiture of its charter as prescribed by section 5169.

**Penalty for violation.**

5. The original statute, chapter 359, Laws 1899, imposed both fine and forfeiture of charter but the revision of 1905, (sections 5168, 5169) changed the statute in that respect, thereby making the penalty of forfeiture of the charter the exclusive punishment as to domestic corporations.

**Defense against statute.**

6. A violation of the statute by the formation of a combination to do the acts prohibited cannot be excused by facts tending to justify the act, and which would have been proper and legal had the members thereof acted independently of the combination.

**Violation of statute.**

7. A combination of several persons and corporations, all independent dealers in milk and cream, to raise and increase the price thereof, is a violation of the statute, though the increased price was necessary to afford them a profit.

**Expert witness — cross-examination.**

8. The credibility of an expert witness is ordinarily to be tested by his cross-examination, and though it may be proper to do so by the testimony of another expert specially qualified in respect to the subject-matter, the extent to which the examination of such other expert may be carried rests, as in the case of cross-examination, in the sound discretion of the court.

**Evidence — rulings of trial court.**

9. Evidence held to support the verdict, that no errors were committed by the trial court in its rulings upon the admission or exclusion of evidence, or in its charge to the jury.

The Minneapolis Milk Co. and 13 others were indicted by the grand jury for entering into a combination in restraint of trade,

tending to fix the price of milk and cream and to prevent competition in the purchase and sale thereof. The milk company and Albert R. Ruhnke demanded a separate trial and were tried before Jelley, J., and a jury and convicted. A fine of \$3,000 was imposed on the milk company, and a fine of \$3,000 upon defendant Ruhnke, who was sentenced, in case of default in payment, to be confined in the common jail of the county for a period not to exceed three years. From orders denying new trials, both defendants appealed. Affirmed.

*Brooks & Jamison*, for appellants.

*Lyndon A. Smith*, Attorney General, *James Robertson*, County Attorney, *Mathias Baldwin* and *John F. Bonner*, Assistant County Attorneys, for respondent.

BROWN, C. J.

Defendants with other persons and corporations were jointly indicted by the grand jury of Hennepin county, and thereby charged with a conspiracy to raise the price of milk and cream in violation of section 5168, R. L. 1905. A separate trial was had as to defendants Ruhnke and the Minneapolis Milk Co., a corporation, a verdict of guilty was returned by the jury, and defendants appealed from orders denying their separate motions for a new trial.

The assignments of error present the questions: (1) Whether the indictment states facts constituting a public offense; (2) whether the defendant corporation is indictable under the particular statute, and subject to the fine imposed by section 5168; (3) whether there were any errors in the admission or exclusion of evidence on the trial below, or errors in the instructions or refusals to instruct the jury; and (4) whether the evidence is sufficient to sustain the conviction of either defendant. We dispose of these questions in the order stated.

1. The statute upon which the indictment is founded, speaking generally, provides that any person or association of persons who enter into any pool, trust, agreement, or combination, with any person or association, corporate or otherwise, in restraint of trade, which tends in any way or degree to limit, fix, control, maintain or regulate the price of any article of trade bought and sold within the

limits of the state, or which limits and prevents competition in the sale or purchase thereof, or which tends or is designed so to do, shall be guilty of a felony and punished by fine or imprisonment as therein provided. Section 5168, R. L. 1905.

Six separate corporations and eight individuals were accused by the indictment of the violation of the statute. It is charged by the indictment that on the twenty-ninth day of September, 1912, at Minneapolis, this state, the defendants controlled and did a large percentage of the trade in milk and cream in said city, and that they "jointly and severally" bought and sold large quantities of such milk and cream, and were able to limit, control and regulate the price of said commodities, and for a long time prior to the date named were selling and disposing of the same at the prices stated; that on said date defendants wilfully and unlawfully entered into a pool, trust agreement and understanding, each with all the others, for the purpose of preventing competition in the sale of milk and cream, as well as to limit and fix the price thereof, and did then and there in pursuance of such conspiracy raise the price of milk and cream from the price theretofore demanded for the same. The indictment contains other allegations, but the foregoing is sufficient to an understanding of the question whether a public offense is stated therein.

The contention of defendants is that since the indictment charges that all the defendants on and prior to the date named therein were "jointly" engaged in the sale of milk and cream, they cannot be held to have violated the statute by raising the price of the articles so jointly sold. If the indictment be construed in harmony with defendants' claim, the contention made is sound. For if all these parties were jointly engaged in a common enterprise, and were not independent dealers, they were at perfect liberty to demand such prices for their products as they pleased, and for so doing, even though they raised the price, no charge of violating the statute could be made against them.

But we are of opinion and so hold that the indictment should not be construed as charging that defendants were jointly engaged in the particular business. It alleges that they were "jointly and severally" so engaged, and from this the conclusion naturally follows

that they were to some extent at least independent dealers, and for the purpose of regulating and limiting prices that they formed the conspiracy charged. Though indictments are construed strictly and no intendments indulged in support thereof, a reasonable interpretation of the language employed in stating the offense is always permissible, particularly in respect to matters of description or inducement. 2 Dunnell, Minn. Dig. § 29; 22 Cyc. 300; *State v. Mayberry*, 48 Me. 218. The allegations of the indictment relative to the nature of the business conducted by defendants, and that they were "jointly and severally" engaged therein, are matters of description or inducement, and properly construed as charging that they were to some extent independent dealers, and not all jointly associated together as one concern. So construing the allegations, the indictment is sufficient, and charges a violation of the statute.

2. The question whether a domestic corporation joining in the violation of the statute is subject to the penalty imposed by section 5168, a fine or imprisonment, is presented for the first time. Proceedings against corporations heretofore have been conducted under section 5169, for the forfeiture of their charters. *State v. Duluth Board of Trade*, 107 Minn. 506, 516, 121 N. W. 395, 23 L.R.A. (N.S.) 1260; *State v. Creamery Package Mnfg. Co.* 110 Minn. 415, 125 N. W. 126, 623, 136 Am. St. 514. In the case at bar the defendant corporation was proceeded against under section 5168, and the contention of the state is that corporations are subject to the double penalty of a fine of \$500 to \$5,000, under section 5168, and forfeiture of their corporate existence under section 5169, while the defendant milk company insists that it is not subject to criminal prosecution under section 5168, and that the only penalty that may be imposed upon it for a violation of the statute is a forfeiture of its charter. The question is one of legislative intention, to be gathered from the two sections of the statute construed together, and in connection perhaps with the prior statute of which those referred to are a revision.

It is not contended that a corporation is not indictable for a violation of penal laws, or that it is exempt from that sort of prosecution and punishment because it is not included in the word "per-

son" in statutes declaring that any person violating the law shall be punished, and it is conceded that, generally speaking, corporations are included within the scope of such statutes. But it is claimed that, by the revision of the particular statutes, the intention of the legislature to exclude corporations from the penalty prescribed by section 5168 is clear and manifest. In this we concur. By this we are not to be understood as holding that a corporation may not be indicted and convicted under the statute, and the conviction made the basis of proceedings under section 5169 for the forfeiture of its charter. In fact that would seem an orderly and proper procedure. But we do hold that the corporation may not be proceeded against under that section for the purpose, if found guilty of a violation thereof, of imposing the fine there prescribed. In our view of the matter sections 5168 and 5169 are perfectly clear and unambiguous, and there is no room for construction. If they were the original enactment, no doubt could arise as to the intention of the legislature in respect to the penalties imposed, and the conclusion would necessarily follow, from the language thereof, that separate penalties were intended.

The only doubt in the matter arises when reference is made to the prior statutes. The new statute is clear, it becomes ambiguous or doubtful only by referring to the original of which the new is a revision. In construing a revised statute a doubt or ambiguity in its meaning cannot be thus raised. *Hamilton v. Rathbone*, 175 U. S. 414, 20 Sup. Ct. 155, 44 L. ed. 219; *State v. Stroschein*, 99 Minn. 248, 109 N. W. 235. But, apply the rule that the old statute may be referred to, a consideration thereof in connection with the new only confirms the view stated, and leaves no fair doubt that the legislature by the last enactment intended to impose separate penalties upon persons and corporations. The original statute, chapter 359, p. 487, Laws 1899, covered the entire subject in detail. Section 1 thereof prohibited generally the formation of trusts and combinations by persons and corporations and declared them unlawful. Section 2 provided that "every person" who shall enter into any such prohibited trust or combination shall be punished by a fine of not less than \$500, nor more than \$5,000, or by imprisonment in

the state prison for not less than three nor more than five years. Section 3 provided that "any corporation," organized under the laws of the state, found guilty of a violation of the statutes should, "in addition to the penalty prescribed in section two of this act," forfeit its charter, rights and franchises. This as just stated imposed upon the domestic corporation double punishment for a violation of the statute. The same section imposed as punishment upon the foreign corporation banishment from the state only. Section 7 provides that the word "person" as used in the act should include corporations.

If these various provisions of the statute had been carried forward unchanged into the revision of 1905, there could be no question of the correctness of the position of the state, for it is clear that double punishment for the guilty corporation was therein intentionally provided for. They were not, however, carried forward in the form as originally enacted, but substantial changes were made which point to but one conclusion, namely, a purpose as already suggested to change the law. The original statute contained several sections and covered the subject of trusts and combinations in some detail. The whole of that act was reduced by the revision and included in two comprehensive sections, 5168 and 5169, which embrace every element of the prior statute. The first section provides that every person violating the statute shall be punished by fine or imprisonment. The next section provides that every domestic corporation violating the act shall, "in addition to the penalties imposed upon the members thereof" by section 5168, forfeit its charter, rights and franchises. The important change in the language of this section is found in this; the prior statute imposed upon domestic corporations as a penalty for a violation of the statute, forfeiture of their charters, "in addition to the penalty prescribed in section two of this act," which was fine or imprisonment. This was modified by the revision so as to impose a forfeiture of the charter, "in addition to the penalties imposed upon the members thereof." This change was significant and suggestive only of a purpose to relieve the corporation of double punishment.

The contention of the state that the words "members thereof,"

found in the clause last quoted, has reference to members of the unlawful combination is clearly not sound. The subject matter of the section is the punishment of domestic corporations, and the reference to "members thereof" refers and clearly was intended to refer to members of the corporation with respect to which the section deals. This harmonizes with the grammatical analysis of the language of the section; and it is elementary that in construing a statute the ordinary rules of grammar will be applied, except when a manifest injustice will follow, or a result reached which is obviously at variance with the legislative intent. This particular statute does not come within the exception. The language thereof is clear. And while a change in the language of a revised statute does not necessarily indicate an intention to alter the law, and the presumption is that no such purpose was intended, where a change as clear and significant as the one here involved in fact modifies the statute in point of substance, the presumption that no change was intended must yield to the fact. *Farmers Co-operative Co. v. Enge*, 122 Minn. 316, 142 N. W. 328. Corporations act only through their officers and members, and such officers and members for a violation of the statute are punishable as individuals under section 5168.

The former statute, in so far as it imposed double punishment upon the corporation, was undoubtedly deemed by the revision commission too severe, and the legislature evidently adopted that view in accepting and enacting the statute as revised. In other words, it was thought that the statute was a little drastic in providing for the punishment of the members of the corporation by fine, imposing the same punishment upon the corporation, and then as a climax, declaring that the corporation be put to death. Such was the situation before the revision, and we are satisfied that the intention was to change the law, on the theory that to impose a fine upon a corporation was more or less an idle ceremony, and that a forfeiture of its charter would more effectively prevent further violations of the law by the guilty corporation. Our view of the amended statute is sustained by *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015, where a similar statute was construed as not to authorize both a fine and dissolution of the corporation.



3. A number of the assignments of error may be disposed of together and without extended discussion. The statute condemns and prohibits the formation of trusts and combinations in restraint of trade, or for the purpose of controlling the market, or raising the price of commodities of sale. The law was enacted to prevent the same and to punish those guilty of its violation. In a case like that at bar where the charge is the formation of a combination between several persons and corporations to increase the price of products sold and dealt in by each, it would seem unimportant that an increase of price was justified, either in view of the cost of production or other circumstances which might justify the individual to demand more for his goods. The statute was not designed as means for the regulation of the public market, nor as an attempt to control the price of goods offered for sale, but rather to check the tendency toward monopolization and to prohibit several dealers from combining together, the effect of which is the organized stifling of competition; and the aim of the statute was to remedy or prevent that evil. And in this case the first and important issue was whether a combination was formed by the defendant as charged in the indictment and for the purposes therein alleged. Evidence tending to show that defendants theretofore had been selling their milk and cream at a loss, or that other dealers more favorably situated occupied an advantageous position in the trade, or that defendants had valid and sufficient reasons for raising the price, would not constitute a defense or justify the wrongful combination. Malice is not an essential element in a prosecution for the violation of the statute. The sole inquiry is, was the combination formed for a purpose prohibited by the law, and whether the parties intended to violate the law is immaterial. 1 Dunnell, Minn. Dig. § 2409; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526. And though defendants, acting independently, could have raised prices without subjecting themselves to a charge of violating the statute, their act in combining together to do so is prohibited, and evidence which only tended to justify or excuse the combination was properly rejected. This covers a number of alleged errors which we do not consider separately.

4. That defendants held a meeting at the time charged in the indictment, either for the purpose of forming a milk dealers association in Minneapolis, or for the purpose of forming the alleged unlawful combination, is clear from the evidence. In fact the meeting is not disputed by defendants. They claim, however, that it was for the sole purpose of organizing the association, and with no purpose to combine in an agreement to raise prices. While the state claims that the organization of the milk dealers association was a mere incident to the main purpose of the meeting, which was to form the unlawful combination charged in the indictment.

In some way the public authorities learned of the contemplated action of the milk dealers of the city, and detectives were employed to discover and bring to light the facts. The detectives were informed that the dealers were to hold a meeting at a certain place on the afternoon of September 29, 1912. Prior to the meeting the detectives gained entrance to the room in which it was to be held and installed therein a dictograph, properly connected by wires with a receiver placed in a closet adjoining the meeting room. The detectives concealed themselves in the closet and remained there during the meeting and subsequently reported the information gained by them. One of the detectives was a stenographer and made shorthand notes of things heard over the dictograph, while the other detective listened at the door leading from the closet to the meeting room. Both were produced as witnesses on the trial below; the stenographer testified to the contents of the notes made by him in the manner stated, from which the jury was justified in finding that the meeting was one called and held by the members thereof for the purpose of entering into an agreement to raise the price of milk and cream, and incidentally to form a milk dealers' association; the testimony of the witness was corroborated by the other detective who overheard what took place and what was said by the members of the gathering by listening at the door leading into the room. The stenographer's original notes were received in evidence, and several erasures and interlineations appear to have been made therein. These the witness fully explained, and the verity of his explanation was for the jury.

Defendants called R. A. Mabey, a court reporter of long experience, and attempted to show by him the incompetency of the detective as a stenographer, or the inaccuracy of his notes, and that they were unreliable. Much of his testimony upon the subject was received, and other portions excluded by the court on objection by the county attorney.

Complaint is made of these rulings. We have examined the record with care and find no sufficient reason for holding that any prejudice resulted to defendants, if it be conceded that some of the rulings were technically error. Why the county attorney persisted in interposing objections to the testimony of this and other witnesses produced by defendants is not made clear by the record. Many of them might well have been omitted. We fail to see, however, wherein defendants were substantially prejudiced. The whole testimony of witness Mabey related to the qualifications of the detective as a stenographic writer, the verity of his stenographic notes, and in point of substance was the opinion of the witness respecting the ability of the detective to make an accurate report of the proceedings; and also his opinion concerning the erasures and changes appearing upon the face of the notes. The credibility of a witness is ordinarily to be tested by cross-examination, and though it may be proper to do so in the manner here attempted, by the testimony of an expert, especially qualified in respect to the subject-matter, the extent to which the examination of the expert may be carried for this purpose, where he does not speak from personal knowledge, rests, as in the case of cross-examination for the same purpose, in the sound discretion of the court; no abuse of which appears. Witness Mabey did not profess any personal knowledge of the qualifications of the detective. *People v. Holmes*, 111 Mich. 364, 69 N. W. 501; *Laros v. Com.* 84 Pa. St. 200; *Lawson*, *Expert Ev.* 275, et seq.

5. The charge of the learned trial court was a comprehensive and complete statement to the jury of the issues in the case and the rules and principles of law applicable thereto. We discover therein no error of which defendant can complain. It is well-settled law in this state that the trial judge in criminal cases may review the evi-

dence in his instructions to the jury, and may state to them that it tends to prove certain facts; *State v. Rose*, 47 Minn. 47, 49 N. W. 404.

The only restriction upon the right is that the review shall be fair and impartial, and not in a manner naturally to confuse the jury, or to lead them to a particular result. *State v. Yates*, 99 Minn. 461, 109 N. W. 1070; 1 Dunnell, Minn. Dig. § 2479. If the charge in the case at bar may, by close analysis, be said to be inaccurate in any substantial respect, we are clear that such inaccuracy was not of a nature to mislead the jury. They were expressly informed that the increase in the price of milk, though made by all the defendants on the same day, was not a violation of the statute, and that no conviction could be had unless it appeared that the defendants jointly entered into an agreement for that purpose. And further that, if such agreement was entered into, the statute was violated. The rules of law applicable to the issues were clearly stated, and the requests presented by defendant were all sufficiently covered by the general charge. We find no error of a nature to require reversal.

6. The question whether the county attorney was guilty of misconduct in delivering an interview to the newspapers at the close of the trial, of an inflammatory nature, was peculiarly one for the trial court to determine. While the county attorney practically conceded the fact that he made certain statements to newspaper reporters, and that such statements were published and probably reached the jurors, who were not in charge of an officer pending the trial, yet it was for the trial court to determine the effect thereof upon the jurors, and whether prejudice therefrom resulted. The act of the prosecuting attorney in this respect, even though his remarks were not intended for publication, and he so informed the reporters, is not to be commended.

This covers all that need be said. We have considered all the assignments of error not specially treated by the opinion, with the result that no error as to defendant Ruhnke appears; the evidence sustains the verdict, and the order denying his motion for a new trial is affirmed. And since defendant milk company is not subject to the penalty prescribed by section 5168, the court erred in im-

posing it, and the order denying its motion for a new trial is reversed.

HALLAM, J. (dissenting).

I cannot concur in the portion of the foregoing opinion which holds that under sections 5168, 5169, R. L. 1905, domestic corporations offending against the provisions of 5168 are not liable to the general penal provisions of that section, but that such corporations are liable only to punishment by forfeiture of charter.

It appears to me that the general penal provisions of section 5168, R. L. 1905, apply to corporations to the same extent as to individuals.

Section 5168 makes it an offense to "enter into any pool, trust agreement, combination, or understanding" in restraint of trade, or to limit, fix, control, maintain or regulate the price of any article of trade, manufacture or use or to limit the production thereof, or to prevent or limit competition in the purchase or sale thereof, and it contains the general penal clause that every person violating any provision of that section shall be punished by fine or imprisonment.

If this section stood alone, it would concededly be broad enough to cover corporations, for the word "person" includes corporations. R. L. 1905, § 4748, subd. 11. The trouble arises from the language of section 5169. This section provides that every domestic corporation violating any provision of section 5168, "or which shall in any way assist in carrying out any of the purposes of such illegal pool, trust agreement, combination, or understanding, in addition to the penalties imposed upon the members thereof by said section, shall forfeit all its corporate franchises."

It is contended that the term "members thereof" as here used, means members of the corporation and that the use of the language quoted, taken in connection with all of the provisions of these sections, indicates an intention to impose punishment by section 5168 only upon natural persons, and by section 5169 to impose upon domestic corporations only the additional punishment of forfeiture of charter, to the exclusion of the punishment imposed by the general penal provisions of section 5168.

I cannot concur in this construction. It appears to me that sec-

tion 5168 was intended, as its language imports, to impose the punishment therein prescribed upon all participants in the prohibited combinations, including corporations so participating; that the term "members," used in section 5169, means members of the combination, not members of the corporation, and that the provision of section 5169 imposing the penalty of forfeiture upon domestic corporations participating in any illegal combination, "in addition to the penalties imposed upon the members thereof" by section 5168, means that such punishment is in addition to the penalties imposed upon all members of the combination by that section. This use of the term "members" is consistent with the language of both sections. The preceding section does impose penalties upon the members of the combination. It does not impose penalties upon the members of the corporation as such. It does not impose a penalty upon members of the corporation at all, unless they may be active participants in the combination, and then only as such participants.

If it is not clear that this is the correct view, then it must at least be said that the language is ambiguous, and in such case resort may be had, in interpreting its meaning, to the history of this legislation and to the terms of the statute in force prior to the revision. It is conceded that under the statute in force prior to the revision, the general penal provisions now embodied in section 5168 did apply to corporations as well as to individuals and that the penalty of forfeiture of charter imposed upon domestic corporations was in addition thereto. Changes in language made by a revision of statutes are not to be regarded as altering the law, unless it is clear that such was the intention. *Becklin v. Becklin*, 99 Minn. 307, 109 N. W. 243; *Odegard v. Lemire*, 107 Minn. 315, 119 N. W. 1057.

That the construction of the word "members," above indicated, is the correct one, is, it seems to me, made clear by reference to the language of the various statutes which were incorporated in the revision.

The first of these statutes was chapter 10, p. 82, Laws 1891. This act made it an offense to "create, enter into, become a member of or a party to" any pool, trust, agreement, combination or confederation to regulate or fix prices of or control the output of certain commodi-

ties. This language was carried forward into G. S. 1894, §§ 6955, 6956.

Chapter 359, p. 487, Laws 1899, without repealing the act of 1891, covered the same ground, and more. Instead, however, of using the terms "create, enter into, become a member of or a party to" any such pool, it used only the words, "enter into" such combination.

Chapter 194, p. 269, Laws 1901, prohibits pools, trusts or combinations, and prohibits the boycott of any other person or corporation because "not a member of or party to" any such combination.

All of these acts were before the revisers when they compiled the Revised Laws of 1905, and it appears to me that in drafting section 5169, when they used the term "members" in the provision that domestic corporations engaging in any illegal pool, trust or combination, should be subject to forfeiture of charter in "addition to the penalties imposed upon the members thereof," they used it as it was used in the act of 1891, the General Statutes of 1894, and the act of 1901, and that the legislature had the same intent when it adopted their revision. If such is the case, then the prior statute was not changed by the Revised Laws of 1905, and corporations are now, as before, subject to the same penalties as individuals.

It should also be noted that the revisers in their report upon the whole criminal code say, "only one material change has been proposed, and that not a change of law, but of definition," introducing the term "gross misdemeanor," as defining a certain class of offenses. Revisers' Report, page 37. This, while not conclusive, is entitled to some force.

The following modification of the order was filed on December 15, 1913:

PER CURIAM.

Our attention has been called by the Attorney General to the fact that the order remanding the cause is perhaps indefinite and should be corrected. In view of the conclusion that the corporation might be proceeded against by indictment and conviction and the judgment

rendered thereon made the basis for dissolution proceedings, the order remanding the cause should have been with directions to the court below to modify its judgment by eliminating the fine, leaving the judgment stand as one of conviction of the crime charged. The former order is therefore modified accordingly, and the reversal of the order denying the motion of the corporation for a new trial is withdrawn.

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**W. S. HOLLISTON v. FRED ERNSTON and Another.<sup>1</sup>**

December 12, 1913.

Nos. 18,389—(112).

**Restraint of trade.**

1. A covenant in a bill of sale of a bus and baggage transfer business, not to engage in the same business in a certain city, *held* not unlawful as an unreasonable restraint of trade.

**Enforcing covenant by injunction.**

2. Such covenants are enforceable by injunctions, which should be freely granted.

**Party to action.**

3. Plaintiff, being a party to the contract, had the right to maintain the suit, though he made the purchase for an undisclosed principal, and had no interest in the transaction except under a contract with his principal to employ him if he made the purchase.

**Rulings on testimony.**

4. There were no reversible errors in rulings on testimony.

**Covenant construed.**

5. A covenant "not to start a bus line in Granite Falls, or drive a bus in Granite Falls," *held*, in view of the whole transaction in connection with which it was made, to amount to an agreement by the covenantees not to engage in the business so as to bring their names and influence to the aid of any competitor.

<sup>1</sup> Reported in 144 N. W. 415.

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Note.—On the question of the validity of an agreement in restraint of trade or profession as affected by its territorial scope, see note in 24 L.R.A.(N.S.) 913. 124 M.—4.



After the dismissal of the former appeal, reported in 120 Minn. 507, 139 N. W. 805, plaintiff's motion to amend the complaint and findings was granted and his motion to amend the order for judgment was denied, Qvale, J. From the judgment entered pursuant to the order for judgment, plaintiff and defendants appealed. Affirmed on defendants' appeal. Reversed on plaintiff's appeal.

*Daly & Barnard and Bert O. Loe, for plaintiff.*

*Davis & Michel, Paul D. Stratton and John I. Davis, for defendants.*

PHILIP E. BROWN, J.

Action for specific performance, by injunction, of a contract not to engage in business. The cause was tried to the court, findings made, and judgment ordered for plaintiff for partial relief. An appeal therefrom was dismissed for want of jurisdiction. Subsequently the complaint and findings were amended on plaintiff's motion, judgment was entered awarding him no greater relief, and both parties appealed.

The trial court found in substance: For years prior to June 14, 1911, defendants were engaged, for others, in operating omnibus and baggage transfer lines in Granite Falls, and thus acquired acquaintance and confidence of travelers. On the date stated they purchased an omnibus and baggage transfer line, and operated it in the city for about three months thereafter, when, on August 21, 1911, having established a paying business, they sold their equipment to plaintiff, and executed to him a bill of sale in the usual form, but containing this provision: "Also the two Ernston Brothers, Fred and Jule, agree not to start a bus line in Granite Falls, or drive a bus in Granite Falls, as a part of the consideration of this bill of sale;" this contract, however, being found by the court not to constitute a sale of the "good will" of the business. Plaintiff, furthermore, was not the true purchaser of the property, but acted in behalf of Peterson Brothers, competitors of defendants in the bus and baggage transfer business, who furnished the consideration and to whom the property was forthwith delivered by plaintiff. Prior to plaintiff's purchase, these parties agreed to employ him at a stated sum per month as a bus driver, if he effectuated the purchase in his

name, such employment to continue while the contract was in force; and this agreement was concealed from defendants, who were unaware thereof and likewise ignorant of the connection of the Petersons with the purchase. Plaintiff immediately entered into such employment and has continued therein, his further retention of his position, however, being dependent upon the validity and enforcement of the restrictive covenant above referred to. Peterson Brothers have, since the sale, operated the line purchased in connection with one previously owned by them. After the sale, defendants' mother acquired omnibuses and a wagon, and has since been engaged in operating a bus and baggage line, with defendants as managers, and they have been driving the vehicles, meeting trains, and soliciting customers in competition with Peterson Brothers, and have acquired patronage which otherwise would have been bestowed upon the latter, but have not in any other way started "a bus line in Granite Falls."

Upon these findings, which, being unchallenged, must be taken as conclusive so far as they find the facts, the court ordered judgment enjoining defendants from driving a bus in Granite Falls, so long as plaintiff continues in his present employment.

1. Defendants contend that the covenant involved is in unlawful restraint of trade. We hold otherwise. In harmony with modern authority, this court, long ago, adopted the doctrine of reasonableness of restraint as controlling, when neither monopolistic nor within the inhibition of antitrust laws. Arbitrary rules theretofore applied in some jurisdictions were discarded, and the modern doctrine has since been consistently followed and must be considered established. *National Benefit Co. v. Union Hospital Co.* 45 Minn. 272, 47 N. W. 806, 11 L.R.A. 437; *Kronschnabel-Smith Co. v. Kronschnabel*, 87 Minn. 230, 91 N. W. 892; *State v. Duluth Board of Trade*, 107 Minn. 506, 526, 121 N. W. 395, 23 L.R.A.(N.S.) 1260. See also 9 Cyc. 529. Neither does the fact that the provision is unlimited in time render it nugatory (*High, Injunctions* [4th ed.] § 1168a), and it remains in force during the life of the covenantors. See note to 92 Am. Dec. 754; *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L.R.A. 389, 56 Am. St. 650. We are unable to see the materiality,

so far as the validity of the contract is concerned, of the fact that the Petersons were the real purchasers and concealed their interest by dealing through their agent. The questions, if any, arising in this regard are practically unargued, and consequently have not been seriously considered.

2. Defendants contend that as plaintiff had no ownership of the property and was not conducting any business therewith, he suffered no damage from the breach, if any, of the covenant, and that his interest in his contract of employment was insufficient to permit him to maintain this action or to obtain equitable relief. It would seem that defendants should not be greatly concerned in these matters; for having received a consideration for the contract the important question is its breach, and it is clear that plaintiff has an interest therein. If he had the right to maintain this suit, there can be no doubt that injunction is the proper remedy. Violation of a negative covenant such as this is deemed a sufficient ground for interference, and injunctions are freely granted almost as a matter of course in such and analogous cases. In *World's Columbian Exposition v. United States*, 56 Fed. 654, 667, 6 C. C. A. 58, 72, Chief Justice Fuller, said:

"It is true that undertakings upon sufficient consideration not to do a given thing may, on occasion, be enforced by restraint of their violation; and where the covenant is express the element of ascertainable pecuniary damage or injury to the covenantee is not regarded as of essential importance."

So also, in *Andrews v. Kingsbury*, 212 Ill. 97, 101, 72 N. E. 11, 13, it was said, with reference to a suit to restrain a defendant from engaging in the newspaper business in violation of a contract to refrain from so doing:

"The general rule that a writ of injunction should only issue where there is an unquestionable right and where irreparable injury will be suffered, and there is no adequate remedy at law either on account of the insolvency of the defendant or for some other cause, is not applicable to this case. Courts of equity will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of negative covenants by prohibiting their breach; and where there is

an express negative covenant, courts of equity will entertain bills for injunctions to prevent their violation, even though the same will occasion no substantial injury or though the remedy be adequate at law."

See also High, Injunctions (4th ed.) §§ 1142, 1168; Bispham, Equity, § 461; 3 Pomeroy, Eq. Jur. (2d ed.) § 1344. It should be noted that we are not considering a case where one not a party to a contract claims to be interested therein and seeks an incidental benefit therefrom; for plaintiff was in terms the purchaser, and had the right to maintain this action both under G. S. 1913, § 7676, and generally. 1 Dunnell, Minn. Dig. § 1895; Pomeroy, Rem. & Rem. Rights, § 175, et seq.; 31 Cyc. 1623; Mechem, Agency, § 755. We quote from the authority last cited:

"It is, therefore, a general rule that where a contract, whether written or unwritten, is, in terms, made with the agent personally, he may sue upon it. This rule is unquestioned where the fact of the agency and the name of his principal are both concealed by the agent."

3. We find no reversible error in rulings on testimony. In so far as objections go to insufficiency of the complaint, they were cured by its amendment, the propriety whereof is unchallenged by any assignment of error.

4. Covenants like the one under consideration will not be extended by construction beyond the fair and natural import of the language used. *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868. However, they must be reasonably interpreted so as to effectuate the intentions of the parties; and when such is found, evasions cannot be permitted to defeat them. The gist of the covenant in suit was that defendants would not engage in business so as to bring their names and influence to the aid of any competitor carrying on the same line of business within the prohibited territory. This was a valuable right, and must be presumed to have entered into the consideration of the bill of sale. Plaintiff thereby purchased their right to compete in their own persons in the business specified; and, defendants having violated the agreement, the relief awarded should be commensurate. While the court found no sale of "good will," yet it ap-

pears that all of defendant's property connected with the business was transferred to the purchaser, and the finding is based wholly upon the transaction and terms of the bill of sale. The relief granted virtually deprived plaintiff and Peterson Brothers of the benefit of the contract, and would permit defendants to retain what they sold. The order is too narrow.

Judgment affirmed on defendants' appeal, but reversed on plaintiff's with directions to award plaintiff a permanent injunction as prayed in the complaint.

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L. A. HUNTOON v. F. BRENDemuEHL and Another.<sup>1</sup>

December 12, 1913.

Nos. 18,463—(125).

**Bailment.**

1. The evidence is examined and it is *held* sufficient to justify a finding of the jury that an agreement between the defendant and the predecessor in title of the plaintiff was an agreement of bailment, and not an agreement for the rental of storage space.

**Written contract — parol evidence admissible, when.**

2. Where there is a dispute whether a written agreement between the parties ever existed, and none is produced and none found, parol evidence of the contents of the alleged instrument, the proper foundation being laid, is admissible.

**Liability of bailee unaffected by chattel mortgage.**

3. After the bailment of property the bailor gave a note to the bailee in renewal of an old note, and secured it by a mortgage on the property bailed. The mortgage contained the usual printed clause to the effect that so long as the mortgagor performed the conditions of the mortgage he should remain in possession, and that in consideration thereof he agreed to keep the property in as good condition as it then was at his own cost and expense. It is *held* that such a provision in no way affects the liability of the mortgagee as bailee.

<sup>1</sup> Reported in 144 N. W. 426.

**Action on note — counterclaim by bailor.**

4. After the bailment the bailee became bankrupt and a trustee was appointed. The evidence does not definitely show whether the loss of or damage to the bailed property was before or after the bailee's bankruptcy. It is *held* that in a suit on the note transferred by the trustee to the plaintiff the bailor can set off damages sustained through a breach of the contract of bailment, whether the damage occurred while the property was in the possession of the bailee or of his trustee in bankruptcy.

Action in the district court for Clay county to recover \$179.90 upon a promissory note. The facts are stated in the opinion. The case was tried before Nye, J., who denied motions to return a directed verdict in favor of each party, and a jury which returned a verdict in favor of defendant. From an order granting plaintiff's motion for judgment notwithstanding the verdict, defendants appealed. *Reversed.*

*F. H. Peterson and Edwin Adams*, for appellants.

*Edgar E. Sharp*, for respondent.

**DIBELL, C.**

This action was brought to recover upon a promissory note made by the defendants to the plaintiff's assignor. The defendants sought to set off damages for a breach of a contract of bailment made by the predecessor in title of the plaintiff. The jury found for the defendants. The court, upon an alternative motion for judgment or for a new trial, granted judgment notwithstanding the verdict. The defendants appeal.

1. The defendants admitted liability upon the note, leaving for determination their right to set off damages arising from the breach of the contract of bailment.

In the fall of 1909 one Goodsell had a warehouse at Moorhead. The defendants claim that in November of that year he received from them in storage 1800 bushels of potatoes at a storage charge of five cents per bushel. The plaintiff claims that the agreement, if any at all was made, was nothing more than an agreement for the rental of storage space, and it did not contemplate that Goodsell should have charge of the potatoes and attend to their proper keeping as a ware-

houseman. The evidence, much in dispute, is such as to justify the finding which the jury made that Goodsell occupied the position of a warehouseman. The trial court correctly adopted this view.

2. There was a sharp conflict in the testimony as to whether there was ever a written contract of bailment, the defendant claiming there was and Goodsell claiming there was not. A written contract could not be found. The plaintiff urges that the existence of the instrument being in dispute the contents cannot be shown by parol. He relies upon *Board of Education of Sauk Centre v. Moore*, 17 Minn. 391, 403 (412), which adopts the statement in 1 Greenleaf, § 88, to the effect that "oral evidence cannot be substituted for any writing, the existence of which is disputed." In the sixteenth edition of this work, edited by Dean Wigmore, it is said that the phrase quoted is "an improper limitation, and should be omitted." It seems likely that the author intended to say no more than that the non-existence of the instrument must be shown, in other words, that the instrument must be produced or its nonproduction accounted for. So understood, the language of the author is unobjectionable. If it be understood to mean that, if there is a dispute as to whether an alleged written instrument ever existed, parol evidence cannot be offered of the contents, a foundation being laid, it is clearly wrong. No such working rule is possible. The trial court was right in its ruling in this connection.

3. A few days after the potatoes were put in storage a note was executed by the defendants to Goodsell in place of a former one and was secured by a mortgage upon the potatoes. The mortgage contained this printed provision:

"And as long as the conditions of this mortgage are fulfilled, the said mortgagor to remain in peaceful possession of said property, and in consideration thereof he agrees to keep said property in as good condition as it now is, at his own cost and expense."

The plaintiff contends that this provision is an agreement which releases the bailee from the liability of a warehouseman. We are unable to so construe it. The provision states the rights and liabilities of the parties mortgagor and mortgagee under the mortgage, but not their rights and liabilities under the contract of bailment.

4. Goodsell went into bankruptcy January 20, 1910. One Costain was appointed receiver and on February 9, 1910, was appointed trustee. Thereafter, at what time does not appear, but at a time which we may assume to be very considerably later, Costain as trustee sold the note to the plaintiff.

The defendants interposed a breach of the contract of bailment as a set-off and upon this ground prevailed, the breach consisting in the loss of some of the potatoes, and damage by freezing. The plaintiff now claims that there is nothing to show whether the damage done to the potatoes, or their loss, occurred prior to January 20, when Goodsell became a bankrupt, and that therefore there cannot be a set-off. There was no evidence upon which the jury could find the precise time when the damage was done or the loss occurred and the theory of the plaintiff and the trial court was that if the damage was not done prior to January 20 there could not be a set-off of damages.

Counsel cites section 68b of the Bankrupt Act, 30 St. 565,<sup>1</sup> which provides that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate. This, properly applied, is correct. However, Goodsell owned the warehouse, had a special property in the potatoes as bailee, and the ownership of the warehouse and the special property in the potatoes as bailee was at all times either in Goodsell or the trustee; and if the suit had been by the trustee against the defendant he could have successfully interposed a loss in the property bailed whether that loss was occasioned by the bankrupt or his trustee. That is the defense which he now interposes. The plaintiff is in no better position than the trustee from whom he got title to the note. The trustee, suing the bailor on a debt owing the bankrupt, might be met with a claim of damages for the breach of the contract of bailment, whether against the bankrupt bailee or against himself as trustee.

Order reversed with directions to enter judgment on the verdict.

<sup>1</sup> [U. S. Comp. St. 1901, p. 3450.]



STATE v. WILLIAM O'HAGAN.<sup>1</sup>

December 12, 1913.

Nos. 18,485—(2).

**Arson — evidence.**

1. The evidence examined and *held* sufficient to sustain a verdict of arson in the third degree.

**Charge to jury — duty of counsel.**

2. Where the offense is defined by statute and this definition is given to the jury, if defendant desires a more specific statement as to the elements necessary to constitute such offense, he should make a request therefor.

**Same — circumstantial evidence.**

3. The charge as to the prerequisites necessary to justify a conviction upon circumstantial evidence *held* sufficiently favorable to defendant.

**Evidence — failure to offer document.**

4. Defendant was asked if a certain statement had been made to him in a certain letter and answered, "yes." In the absence of any request to produce the letter and of any objection based upon its nonproduction, the omission to offer it in evidence was not error.

**Evidence of motive.**

5. The knowledge possessed by defendant as to the wishes and intentions of his relatives concerning matters of interest to himself may be shown as bearing upon his motives.

**Misconduct of county attorney.**

6. The propounding to him of questions involving improper assumptions and insinuations *held* to have been without substantial prejudice.

**Record on appeal.**

7. The verity of a properly-authenticated return cannot be attacked upon appeal.

William O'Hagan was indicted by the grand jury, tried in the district court for Wright county before Giddings, J., and a jury, and convicted of the crime of arson in the third degree. From an

<sup>1</sup> Reported in 144 N. W. 410.

order denying his motion for a new trial, defendant appealed. Affirmed.

*Latham & Pidgeon and Henry Spindler*, for appellant.

*Lyndon A. Smith*, Attorney General and *Stephen A. Johnson*, County Attorney, for respondent.

TAYLOR, C.

Defendant was convicted of the crime of arson in the third degree and appealed from an order denying a new trial.

In June, 1912, defendant rented the first floor of a two-story frame building in the village of Delano, in Wright county, and was operating a pool room therein at the time of the fire, which was discovered about three o'clock a. m. on August 9, 1912. The remainder of the building not rented by him was vacant and he was the only occupant.

Elaborate preparations to burn the building had been made by some one. From a barrel of paper and other rubbish in the basement strips of paper, with oakum and tape in places, had been strung about the basement, up the stairway from the basement to the first floor, about the first floor, up the stairway from the first to the second floor, about the second floor, and from the second floor into the attic. Portions of the first floor and some of the rubbish therein had been saturated with kerosene. The fire was started in the barrel of paper and rubbish in the basement, but was discovered and extinguished before the barrel and its contents were entirely consumed, and without damage to the building other than the charring of the floor joists above the barrel.

Four of the assignments of error are based upon the charge to the jury.

It is urged that the court omitted to state that to constitute arson some portion of the building must actually be ignited, and for that reason that the crime was not sufficiently defined. The case was tried by both the state and the defendant upon the theory that the building had been set on fire by some one, and no claim was made to the contrary. The court gave the definition of the offense as contained in the statute, and further stated that it was not necessary

that the building be consumed, that it was sufficient if the jury were satisfied beyond a reasonable doubt that the defendant did wilfully "set that building on fire." No request was made for any further or more definite instruction, although the court invited suggestions, and no exception was taken to the instruction as given. If defendant desired a more specific statement as to the character of the burning necessary to constitute arson he should have made a request therefor.

In stating the rule in respect to circumstantial evidence the court said: "The circumstances proven must be such as to exclude any other conclusion, and to permit of no other hypothesis than that of the truth of the charge laid in the indictment, and in this case, before you can convict the defendant of this charge, the evidence, the circumstances proven, must be such as to exclude any other reasonable conclusion than that of the guilt of the defendant." And later again stated that "the state must satisfy you beyond a reasonable doubt, to a moral certainty and to the exclusion of any other supposition, that the defendant and no one else committed the crime charged in the indictment." We think the charge was sufficiently favorable to defendant and that he has no ground for complaint.

The court, after reciting the claims of the state and of the defendant, fairly and clearly stated and submitted the issues to the jury, and we think that no substantial prejudice resulted to defendant from the recital of what was claimed by the state, even if those claims were somewhat broader than the proof warranted.

After defendant had admitted on cross-examination that he had received a letter a few days before the fire from a sister then in Minneapolis, he was asked by the state: "Didn't your sister in that letter say to you as follows: 'You had better come down here and get a pool room and I will keep house for you?' " An objection that the question was incompetent, irrelevant, immaterial and not proper cross-examination was overruled, and he answered: "Yes." He was also asked if he did not receive a letter from another sister about July 15 in which she had said: "I guess papa is going to get a pool room in Minneapolis. Young Levi Van Urden is running it?" to which the same objection was made and overruled, and he answered:

"Yes." At a later part of the trial, these same questions together with others were again asked and answered without objection.

Defendant urges that it was error to permit the state to inquire concerning the contents of these letters without producing or offering in evidence the letters themselves. Aside from the fact that the same evidence was subsequently admitted without any objection, no such objection was made at any time. The fact sought to be elicited was that defendant had received certain information as to the wish of his sister and the intention of his father. He admitted that he had, and the manner in which he received it is not important. There was no request to produce the letters and they were not material.

Defendant also urges that it was error to admit these communications in evidence without showing that he induced the making of them or assented to the suggestions made. What he knew as to the desires of his sister and as to what his father had in contemplation, while not of much probative value, had some bearing on the question of motive. Its weight was for the jury. *State v. Lentz*, 45 Minn. 177, 47 N. W. 720.

Defendant complains of the conduct of the county attorney in asking him questions which contained improper assumptions and insinuations. It is true that certain questions propounded did involve improper assumptions and insinuations and should not have been permitted. No objection was made upon this ground, however, and no objection whatever was made to the most obnoxious of the questions of which he now complains. While these questions should have been excluded had the objection now urged been made to them, yet it was not made, and as defendant promptly denied any knowledge of the matters assumed, we think no substantial prejudice resulted.

Defendant asserts that the settled case as approved by the trial court does not correctly state the answer given by a witness to a question propounded to him at the trial. The controversy as to the wording of this answer was presented to and determined by the trial court, and the record as certified to this court is conclusive upon this appeal. The rule is stated in the syllabus to *State v. Ronk*, 91 Minn.

419, 98 N. W. 334, as follows: "The authenticated return of a cause by the trial judge cannot be questioned in this court on appeal, but we are required to accept such return as a verity. The only method of correcting mistakes in the bill of exceptions or settled case certified here by the proper authority is in a direct proceeding by mandamus to secure a further return." See also *Hemstad v. Hall*, 64 Minn. 136, 66 N. W. 366; *Haidt v. Swift & Co.* 94 Minn. 146, 102 N. W. 388.

Defendant vigorously contends that the evidence was not sufficient to justify the verdict. We have carefully examined the entire record but will not attempt to recapitulate the evidence. It was wholly circumstantial. As to motive, it was not strong. While defendant had his property insured, the amount of the insurance does not appear to have been excessive, and, apparently, he had no debts and possessed some ready money. He was a stranger in the town, his business had probably not been very lucrative, and his family ties were elsewhere. When the fire was discovered all entrances to the building were closed, and either locked, or fastened upon the inside. It is a fair inference from the evidence that he alone had access to the interior of the building, and that there had been no opportunity for any one else to lay the fire-train. It appears without dispute that he had purchased a can of kerosene oil on the day preceding the fire, and that when the firemen entered the building they found this can empty and portions of the floor along the walls and portions of the fire-train saturated with kerosene. Defendant's conduct in several respects was such as to excite suspicion. We will refer only to one instance. When he arrived at the fire he made no attempt to enter the building or to open it so that the firemen could do so. When asked for the key, he said he did not have it and must have lost it. Others broke open the door. Under the evidence, whether defendant was guilty or not guilty was a question for the jury. The issues in the case were submitted to them clearly and impartially, and we find nothing which will warrant this court in setting aside their verdict.

Order affirmed.

GEORGE A. FRENCH and Another v. GEORGE E. YALE.<sup>1</sup>

December 19, 1913.

Nos. 18,021—(40).

**Sale — parol evidence to prove condition of written contract.**

Writing executed by the parties in connection with the sale of a piano, *held* neither such a complete contract of sale nor to sufficiently recite the terms of a past sale, so as to preclude the purchaser from proving by parol evidence a condition attaching to the sale, not embodied in the writing, entitling him to return the property if not satisfactory.

Action in the municipal court of Duluth to recover a balance of \$125. The facts are stated in the opinion. The case was tried before Windom, J., who granted plaintiffs' motion to direct a verdict in their favor. From the judgment entered pursuant to the verdict, defendant appealed to the district court for that county, where the judgment was affirmed by Ensign, Cant and Dancer, JJ. From the order of the district court, defendant appealed. *Reversed.*

*J. B. Arnold and Arnold & Arnold, for appellant.*

*E. J. Kenny, for respondent.*

PHILIP E. BROWN, J.

Appeal by defendant from an order of the district court of St. Louis county, affirming a judgment of the municipal court of Duluth.

Plaintiffs were dealers in musical instruments. After oral negotiations between the parties concerning the purchase of a Conover player-piano, on November 19, 1910, both executed a writing wherein defendant first promised to pay plaintiffs \$800, in instalments, specified both as to amount and time, with interest at five per cent from date; and then the writing proceeded: "The consideration of this contract is the right of possession of one Conover player, style P. C. Mah. No. 126,542 and stool and scarf given me by said French & Bassett, upon the express condition that the title and ownership of

<sup>1</sup> Reported in 144 N. W. 451.

said instrument shall not pass under such delivery or this contract or transaction until the whole of said debt and purchase price are fully paid with interest as aforesaid, and that the giving of renewal contracts or payments thereon shall not divest such title." Then followed an agreement on defendant's part to keep the instrument insured against loss by fire for plaintiffs' protection, and also a provision that in case of default in payments or interest or abuse or attempted sale, incumbrance, or removal from defendant's residence without plaintiffs' written consent, or if possession be parted with without such consent, plaintiffs might declare the contract and debt due, and bring suit for the unpaid balance or take possession of the property and sell the same, the proceeds, however, to be applied first to the expense of the taking and sale, and the balance upon the contract, the surplus, if any, to be returned to defendant, but, if the amount received was insufficient to pay the contract, defendant to be liable for the unpaid balance, which should then be considered due. The writing was headed as follows: "French & Bassett will not be responsible for any written or verbal agreement or promises relative to this contract other than contained on the face hereof."

Plaintiffs forthwith delivered the property specified to defendant, and default thereafter occurring in payments this action followed. Plaintiffs' contention on the trial was that the sale was subject only to conditions stated in the writing, while defendant insisted the actual agreement was that he should take the instrument on trial and keep it, providing it was satisfactory, but otherwise could return it at his option. The latter claim was pleaded, and further that upon trial the piano did not play well, proved unsatisfactory, and defendant shortly after its delivery attempted its return, but plaintiffs refused acceptance. Sufficient showing was made to make these questions for the jury, if oral evidence was competent to establish the agreement claimed outside the writing.

The sole question involved then is: Had defendant a right to prove the agreement alleged by parol evidence, as a condition attaching to the sale? We answer affirmatively. The writing is not a complete contract of sale, nor does it sufficiently recite the terms of a past sale, so as to prevent the application of the well-settled excep-

tion to the general rule excluding oral evidence to contradict or vary the contents of a written contract, namely: That it is competent to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them." *Hand v. Ryan Drug Co.* 63 Minn. 539, 65 N. W. 1081. See also *McLoone v. Brusch*, 119 Minn. 287, 138 N. W. 35.

The document in question, while signed by both parties, contains no stipulation on plaintiffs' part, except as to the disposition of the proceeds of a sale of property therein described in event of foreclosure; says nothing concerning a sale or purchase, fails to state a price, and refers merely to the right of possession of certain described property, such right being "given" defendant by plaintiffs. The writing was evidently executed in part performance of a prior contract, a part only of which has been reduced to writing, and while so much of it as is embodied therein is conclusive as against modification or addition by parol, defendant had the right to prove the other part of the transaction. It is quite like the instruments considered in *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125, and nothing further need be added to what is there stated.

Judgment reversed. Because of delay in printing the record, no statutory costs will be allowed in this court.

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## IRENE MITTON v. CARGILL ELEVATOR COMPANY.<sup>1</sup>

December 19, 1913.

Nos. 18,270—(140).

### **Guard for dangerous machinery.**

1. The evidence was sufficient to justify a finding that defendant was negli-

<sup>1</sup> Reported in 144 N. W. 434.

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Note.—The question of an employee's right of action for employer's violation  
124 M.—5.



gent in failing to provide a railing on a stairway leading to an engine room below, and in failing to guard dangerous machinery therein. Plaintiff's intestate was not an employee of defendant, but was requested by it to go down into the engine room and turn off the engine. *Held* that defendant owed him the duty to use ordinary care in relation to guarding the stairway and the machinery. Whether chapter 288, Laws 1911, is for the benefit of any but employees is not decided.

**Proximate cause of death question for jury.**

2. The evidence did not leave the cause of death a matter of speculation or conjecture, but was sufficient to justify submitting to the jury the question whether defendant's negligence was the proximate cause of the death.

**Contributory negligence — assumption of risk.**

3. It did not conclusively appear that plaintiff's intestate was guilty of contributory negligence or that he assumed the risk.

**Cumulative evidence — photograph.**

4. It is within the discretion of a trial court to limit the undue introduction of cumulative evidence, but in this case it is *held* that certain photographs were not properly excluded on this ground, or upon the ground that they would not assist the jury. When a competent witness testifies that a photograph is a correct representation of the objects it purports to portray, it is not for the court to decide either that the witness is unworthy of belief, or that the photograph is misleading. In such case it is error for the court to exclude the photograph as misleading.

Action in the district court for Hennepin county by the administratrix of the estate of Lorne Mitton, deceased, to recover \$7,500 for the death of her intestate. The answer admitted that there was no guard or rail on the left-hand side of the stairs leading down to defendant's engine room and no fence or guard around the fly wheels therein; it further alleged that the intestate was well acquainted with the engine house and the position of the stairs and engine, and that when he went there he went at his own risk and assumed the risk thereof. The case was tried before Dickinson, J., who when plaintiff rested granted defendant's motion to dismiss. From an order denying of statutory duty as to guards about machinery is treated in a note in 9 L.R.A. (N.S.) 381.

As to what is comprehended in expression "machinery of every description," in statutes imposing duty on master as to placing guards, see note in 30 L.R.A. (N.S.) 36. And for common practice as the measure of master's duty to guard machinery, see note in 16 L.R.A. (N.S.) 140.

ing her motion for a new trial, plaintiff appealed. Reversed and new trial granted.

*O'Brien, Young & Stone*, for appellant.

*Harris Richardson and Walter Richardson*, for respondent.

BUNN, J.

This action was brought by the administratrix of the estate of Lorne Mitton, her deceased husband, to recover damages for his death, alleged to have been caused by the negligence of defendant. At the close of the plaintiff's case, the action was dismissed. Plaintiff appeals from an order denying a new trial.

The chief question involved is whether or not the trial court erred in dismissing the action. The theory upon which the trial court acted, and the position of respondent on this appeal, is that no causal connection was shown between the negligence of defendant and the death of plaintiff's intestate, that the evidence left the cause of death a matter of conjecture.

The following facts appeared from the evidence as it stood when plaintiff rested: Defendant owns and operates a grain elevator at Brown's Valley. Across a driveway from the elevator was the office, and the engine room. This engine room adjoined the office on the west, the only entrance being through the office. The floor of the office was on a level with the driveway, while the floor of the engine room was 6 feet below. Access to the engine room was from the office down a steep stairway. The engine room was 8 feet in length by 7 feet 6 inches in width. The stairway consisted of eight steps, each 2 feet 3 inches long, and 6 inches wide, set into 2x6 side runners. It was against the engine room wall on its north or right side, while on the other side there was no rail or other guard. In descending the vertical distance of six feet, it covered a lateral distance of 3 feet 9 inches. A gasoline engine stood on a seven-inch concrete base on the floor of the room. Its length, including the cylinder, cranks, gearing and fly wheels, was substantially 5 feet. The cylinder was at the north end, and at its nearest point a little over a foot from the center of the bottom step of the stairway. Its top was two feet and a half above the floor. The cranks, gearing and flywheels were at the

south end. The flywheels were 18 inches apart, and were hung on the crank shaft just outside of the engine frame. Each was 41 inches in diameter. The north edge of the left hand or east flywheel was 8 inches from the bottom step of the stairway. Midway between the two flywheels was the crank and the connecting rod bearing, while just outside of the crank was a series of cog-wheels. There was no hood or other guard.

Immediately to the left of the stairway and close to the west wall of the room was a small stove. Further to the left was a water-tank which contained water for cooling the engine, and was 7 feet 6 inches in height, 2 feet 6 inches in diameter. A half inch (interior diameter) iron pipe led from the top of the cylinder to the top of this water-tank. This pipe carried the heated water from the cylinder jacket back to the tank. It was connected with the middle of the top of the cylinder, rose vertically a distance of 4 feet, then turned at right angles and ran to the top of the cooling tank, to which it was connected by a short length of rubber hose.

Lorne Mitton was not an employee of defendant. He was a friend of defendant's superintendent in charge of the elevator. On the afternoon of September 19, 1911, he came into the yard of the superintendent's residence, close to the elevator, and had some conversation with the latter, who asked him to "shut down the engine" which was running. Mitton thereupon proceeded to the office and engine room. A few moments later, the superintendent heard the engine make a peculiar noise, and heard Mitton "holler." He rushed into the engine room and found Mitton caught in the flywheels at the south end. He was standing between the two flywheels in an upright position, facing toward the south wall of the room. His right foot was against the cement base, and his left foot was caught in the right hand flywheel, the one farthest from the stairway. He was extricated, and carried up stairs. The injuries received caused his death four days later.

The electric switch used in starting and stopping the engine was in a cupboard in the southwest corner of the room, at a convenient distance from the floor. To reach it from the stairway it was necessary to go around the north end of the engine, and along a

passageway between the engine and the west wall, to the cupboard. Using the switch was the only practicable way of stopping the engine. It appeared that Mitton was more or less familiar with the engine room, and knew where the switch was and how to reach it. When the superintendent discovered Mitton caught in the flywheel, the iron pipe leading from the cylinder jacket to the water-tank was found torn down, twisted and broken, a part of it had been carried in a direction away from the stairway, and a piece had been dragged into the right-hand flywheel, and had become wrapped around the crankshaft just inside of this flywheel. The electric wires connecting the engine and the switch for part of the distance ran along the iron pipe, and were torn down with it, thus making it impossible to say whether Mitton had turned the switch before he was caught.

1. That there was evidence of negligence on the part of defendant sufficient to take the case to the jury on that issue, there can be no doubt, and it is hardly contended to the contrary. The absence of a railing on the left side of the steep and dangerous stairway, the location of the engine in such close proximity to the stairs and the failure to fence or guard the flywheels, would justify a finding that defendant had failed in the performance of its legal duty to its servants and to those who might be called upon to enter the small engine room.

It is urged by plaintiff that Mitton, though not an employee of defendant, was entitled to the benefit of chapter 288, p. 403, Laws 1911, relating to the guarding of machinery in factories, mills, workshops and buildings where persons are employed. We are asked to hold that this act includes all persons lawfully upon the premises, as well as employees. It is quite unnecessary to decide this question here, as there was clearly a common-law liability, there being no question but that Mitton went into the engine room at the request of defendant, and to perform a service for it.

2. Was it a question for the jury whether defendant's negligence was the proximate cause of Mitton's death? The solution of this problem must be reached by applying the law to the facts of the particular case. It is axiomatic that there must be proof of causal connection between the negligence and the accident. This proof may be direct or circumstantial, but it must be "something more than

consistent with the plaintiff's theory of how the accident occurred." *Rogers v. Minneapolis & St. Louis Ry. Co.* 99 Minn. 34, 108 N. W. 868. "It is necessary that some circumstances be shown which establish, not only that the accident may have happened from the cause alleged, but which indicate, to some extent at least, that such was the cause." *Bruckman v. Chicago, St. P. M. & O. Ry. Co.* 110 Minn. 308, 125 N. W. 263.

That the accident here may have been caused by the failure of defendant to have a railing on the side of the stairway, or by its failure to have a hood over the flywheels, or some other guard, is apparent. The stairway was steep, and the steps but 6 inches wide; the light in the engine room was from one window in the north wall; it is not improbable that Mitton slipped or stumbled as he was descending the stairs and that, because of the absence of a railing, he fell over the cylinder and was caught in the flywheel. If the evidence would justify a finding that the accident happened in this way the case should have gone to the jury. The physical facts are persuasive, if not conclusive, that Mitton did not complete his descent of the stairway and walk in the pathway along the north and west walls to the switch. Had he done so, the accident could hardly have happened; certainly the iron water-pipe leading from the cylinder to the tank would not have been thrown down and broken. It may therefore be fairly assumed that Mitton reached the position he was in when found either by falling from the steps upon and across the engine, or by stepping upon the cylinder in an attempt to reach the switch, slipping and taking hold of the pipe to steady himself. The evidence fairly negatives any other cause than these two.

That Mitton would have been guilty of gross negligence if he attempted to get to the switch by stepping upon the cylinder, and either reaching from there or taking farther steps across the engine and in the midst of the revolving fly- and cog-wheels, is beyond doubt. Indeed it is the contention of defendant. It involved but a few steps to enable him to turn off the engine in safety. The facts are not entirely consistent with this theory of how the accident happened, and when we apply the strong presumption that exists against contribu-

tory negligence when the person charged with it is dead, the probability that the accident happened in this way becomes still less.

After a careful consideration of the evidence, we are not able to agree that the cause of the accident was a matter of conjecture or speculation, and hold that it should have been left to the jury to say whether defendant's negligence was the proximate cause of Mitton's death. Plaintiff was not required to prove causal connection by direct evidence. If the circumstantial evidence was "something more than consistent" with plaintiff's theory, if it furnished a reasonable basis for the inference by the jury of the ultimate fact that the alleged negligence was the cause of the injury complained of, it is sufficient proof of the causal connection to sustain a verdict. Plaintiff was not bound to negative all possible circumstances which would excuse the defendant. Where a cause is shown that might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in absence of a showing of other causes, that the one known was the operative agency in bringing about the result. *Orth v. St. Paul, M. & M. Ry. Co.* 47 Minn. 384, 50 N. W. 363; *Lillstorm v. Northern Pacific R. Co.* 53 Minn. 464, 55 N. W. 624, 20 L.R.A. 587; *Olson v. Great Northern Ry. Co.* 68 Minn. 155, 71 N. W. 5; *Rase v. Minneapolis St. P. & S. S. M. Ry. Co.* 107 Minn. 260, 120 N. W. 360, 21 L.R.A.(N.S.) 138; *Moore v. Northern Pac. Ry. Co.* 108 Minn. 100, 121 N. W. 392; *Demerce v. Minneapolis, St. P. & S. S. M. Ry. Co.* 122 Minn. 171, 142 N. W. 145; *Murphy v. Twin City Taxicab Co.* 122 Minn. 363, 142 N. W. 716. These cases were referred to not so much as authority for the legal principles stated, but as furnishing illustrations of instances where circumstantial evidence, no more persuasive than in the case at bar, was held to justify an inference that the accident was proximately caused by the negligence proven.

3. It is apparent from what we have already said that it did not conclusively appear that Mitton was guilty of contributory negligence, or that he assumed the risk. There is no serious claim that these questions were not for the jury.

Our conclusion is that it was error to dismiss the case.

4. The trial court excluded photographs of the interior of the engine room. We are asked to determine the correctness of this ruling with reference to another trial. About all the photographs show is the stairway, the stove, and one of the flywheels, which appeared greatly exaggerated in size. The trial court characterized the photograph that showed the flywheel thus exaggerated in size, as a monstrosity, and excluded both photographs. It is probable that the reason for the court's ruling was that it considered the photographs misleading, though the objection covered also the ground that a diagram of the engine room and steps was already in evidence, thus making the photographs unnecessary, or merely cumulative evidence. It is within the discretion of the court to restrict the undue introduction of evidence that is merely cumulative, whether it be the testimony of witnesses, or demonstrative evidence. But the photographs offered, leaving aside for the moment the question of their being misleading, showed the stairway in a way that no diagram could, and tended to explain and illustrate the testimony of the witnesses much more clearly than did the diagram. We are unable to say that their exclusion was justified on the ground that there was no necessity for their being before the jury.

Was it for the court to say that the photographs were not true representations, or that they were misleading? The photographer was called as a witness and testified that the photographs were correct representations, after making due allowance for the enlargement of objects close to the lens. We think that it was for the jury and not for the court to say whether the photographs lied, just as it was for the jury and not for the court to decide upon the credibility of any witness. We concur in the statement made by Professor Wigmore on the subject. 1 Wigmore, Evidence, § 792.

Order reversed and new trial granted.

EDMUND T. SYKES v. CITY OF MINNEAPOLIS.<sup>1</sup>

December 19, 1913.

Nos. 18,278—(142).

**City of Minneapolis — removal of officer.**

1. The charter of the city of Minneapolis permits the city council to remove the supervisor of the city water works at will.

**Act constitutional.**

2. Such charter provision does not violate section 2 of article 13 of the Constitution.

From an order of the district court for Hennepin county, Leary, J., sustaining defendant's demurrer to the complaint and ordering judgment in behalf of defendant, plaintiff appealed. Affirmed.

*Fred W. Reed*, for appellant.

*Daniel Fish*, for respondent.

HOLT, J.

The complaint alleges that plaintiff was appointed to the position of supervisor of the waterworks of the city of Minneapolis for a term of two years from January 2, 1911, at the monthly salary of \$300; that he accepted and performed the duties of his office until June 30, 1911, when, without cause and without a hearing, the city council removed him. He demands judgment against the city for the amount of the salary for the balance of the two years. The city demurred to the complaint. From the order sustaining the demurrer plaintiff appeals.

The question presented is the right of the city council to terminate the employment and salary of plaintiff at its pleasure. Of

<sup>1</sup> Reported in 144 N. W. 453.

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Note.—On the question of the right to remove municipal officers summarily, see note in 15 L.R.A. 95. And as to whether power conferred upon municipality to remove its officers is exclusive, see note in 20 L.R.A.(N.S.) 1128. And upon the power of a municipality to remove officer in absence of statutory authority, see notes in 9 L.R.A.(N.S.) 572 and 39 L.R.A.(N.S.) 519.



course it cannot be doubted that as to any employee the city council may dispense with his services at will, regardless of the time for which he was hired, exactly as an individual may dismiss a servant, but that does not say that the appointee or servant so dismissed may not recover as damages the wages thereby lost, if the dismissal was wrongful. However we are not now concerned with a breach of contract of employment, for plaintiff's contention is that he was wrongfully removed from municipal office.

The city waterworks for some years prior to 1887 had been operated by a board of water commissioners under charter provisions giving such board the "right to appoint the engineer of the waterworks and superintendent of the waterworks, a secretary and assistant secretary, and employ such other persons as in the judgment of said board may be necessary for the successful operation and management of said waterworks and to designate and fix the compensation of the persons so to be appointed or employed by said board; and may remove such persons at its pleasure; provided, that such compensation shall not exceed the limits fixed by this act, which compensation shall cease when any such engineer, superintendent, secretary, assistant or other employee shall be so removed by said board."

By section 1 of chapter 23 (page 467) of the special laws of 1887 so much of the charter provision above quoted and so much of specified related sections "as created a board of water commissioners of the city of Minneapolis, is hereby repealed and said board is hereby discontinued and dissolved and all the property within its possession shall be at once turned over to the city council of the city of Minneapolis."

Section 2. "All the rights, powers, and duties and privileges heretofore conferred upon or vested in said board of water commissioners of the city of Minneapolis, by the charter of said city, are hereby conferred upon and vested in the city council of said city of Minneapolis," etc. It is plain that the effect of this legislation was not to repeal the existing charter provisions concerning the city waterworks, its mode of operation and the appointment of its superintendent, engineer, agents and employees, but simply to substi-

tute the city council in place of the board of water commissioners. It necessarily follows that the city council has the right to dismiss at will any officer or employee in the city waterworks department and when such dismissal takes place the salary ceases, unless subsequent legislation has changed the status of persons in the service of the city waterworks department.

We are referred to no subsequent charter amendment that would tend to change the provisions quoted unless it be found in section 1 of chapter 2 enacted by the same legislature.<sup>1</sup> "All other officers" (other than elective) "necessary for the proper management of the affairs of the city shall be appointed by the city council, unless in this charter otherwise provided. The appointment of such officers shall be determined by ballot, and it shall require the affirmative vote of a majority of all the members of the city council to appoint such officers. All officers required to be appointed by the city council shall, unless otherwise in this charter provided, hold their respective offices for the term of two (2) years from and after the first (1st) Monday in January of the year of their appointment."

After the waterworks was transferred to the city council an ordinance was enacted under which the committee on waterworks of the city council was given immediate control and management of everything pertaining to the waterworks, subject to confirmation of the council. But the council retained the right to appoint all officers and employees and prescribe the salaries, upon nominations and recommendations of the committee on waterworks. The ordinance makes provision for a supervisor who shall be the general executive officer of the works and must be an experienced mechanical engineer. His duties practically correspond with those of superintendent under the board of water commissioners' régime.

We are of opinion that the charter provisions relating to the appointment, tenure of position, and removal of so-called officers and employees in the city waterworks when managed by the board of water commissioners are still in force and govern the city council in the conduct of that department. The situation is similar to that in *Parish v. City of St. Paul*, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. 374, where there was a substitution of managing powers. It is

<sup>1</sup> [Sp. Laws 1887, p. 431, c. 10, subc. 2, § 1.]

by no means clear that plaintiff comes within section 1 of chapter 2 of the charter above set out. In terms the section does not say that all persons appointed to a position shall hold the same for two years, but refers to officers *required* to be appointed by the city council. It is near at hand to say that the officers to be appointed for the specified term are those to fill the positions created by the charter itself, such as the city clerk, city engineer, city attorney, etc. Such officers are deemed indispensable to carrying on the strictly governmental functions of the municipality. The city waterworks is one of the public utilities which the city is authorized to own and manage as a side issue, and although it has the right to create officers or places to properly conduct this business the charter does not require this to be done. The position of supervisor was created by the council by ordinance. It may repeal this at pleasure. If it is done the office is gone. The ordinance referred to does not even style the supervisor a city officer but an officer of the "city waterworks."

But be that as it may, we hold that, even if the supervisor of the city waterworks be considered as an officer required to be appointed by the city council and therefore able to claim a definite tenure of office, nevertheless he is subject to removal at the pleasure of the city council. As stated before, we consider the provision in respect to appointment and removal of city waterworks officers and employees is the same now as during the existence of the board of water commissioners, with the single modification that, while under the régime of the board the appointment was for an indefinite time subject to removal at pleasure, it is now for two years subject to removal at pleasure. The provisions are not inconsistent. A person accepting the place formerly did not need to concern himself about an appointment every two years when the complexion of the city council changed, while now he does. His tenure in the meantime is no more secure now than it was then.

A great deal might be said in favor of legislation which gives the city council free hand to remove a superintendent, manager or agent in the city waterworks for the efficient and economical conduct of which, as a business proposition, the council is held responsible. To hold that one appointed to a place in that department could not be

removed within two years, except for malfeasance or nonfeasance and after a trial, as appellant contends, would be to seriously handicap the city council in the conduct of this extensive business enterprise. We have no doubt that the legislature intends to give municipalities authorized to own and manage public utilities the same freedom and opportunity to make the ventures successful as if owned and managed by private corporations or parties.

There is no need to cite authorities to the proposition that, when the appointing power is also authorized to remove at pleasure, it may do so even if the officer has a fixed tenure. But see *State v. Mitchell*, 50 Kan. 289, 33 Pac. 104, 20 L.R.A. 306; 29 Cyc. 1408, note 20; *Hallgren v. Campbell*, 82 Mich. 255, 46 N. W. 381, 9 L.R.A. 408, 21 Am. St. 557, is distinguished from a case like the one at bar by *Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L.R.A. 95.

It is insisted that under the Constitution appellant could not be removed, except upon a hearing and for cause. Section 1 of article 13 of the Constitution relates to the removal of certain state officers by impeachment. Section 2 reads: "The legislature of this state may provide for the removal of inferior officers from office, for malfeasance or nonfeasance in the performance of their duties." There can be no doubt that all elective municipal officers come within this section, and that such may not be removed except for malfeasance or nonfeasance in office.

But we are quite clear that this constitutional provision does not embrace an office created by an ordinance of a city to assist in carrying on the business of a public utility. Thus it is said in *State v. Common Council of City of Duluth*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. 595: "The board of fire commissioners has, under the charter, absolute power to discharge any of the employees or officers of the department at their discretion." *State v. Schram*, 82 Minn. 420, 85 N. W. 155, does not suggest the unconstitutionality of a statute permitting the removal of a city marshal at the will of the council. *State v. Thompson*, 91 Minn. 279, 97 N. W. 887: "It is quite true, as a general proposition, that the power of removal of public officers is incident to the power of appointment (*Parish v.*

City of St. Paul, 84 Minn. 426, 87 N. W. 1124, 87 Am. St. 374), but this applies more particularly to appointive officers, and not to those elected by the people. The subject of removal of all officers is within legislative control, and where that body prescribes a manner and method of removal it is exclusive." So it must be held that, in the statutes constituting the charter of the city of Minneapolis, the legislature has provided that any officer in the city waterworks department, even if appointed for a term, takes such appointment subject to be removed at the pleasure of the city council.

This conclusion renders it unnecessary to construe section 4 of chapter 4 of the charter under which the right is claimed for the city council to remove at pleasure any one of its appointees whether it be one occupying an office created and required by the charter or one filling a position created by the council for the proper conduct of some public utility.

Order affirmed.

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## STATE BANK OF FAIRFAX v. PETER VLAAR and Others.<sup>1</sup>

December 19, 1913.

Nos. 18,281—(131).

### Town ditch — town not liable for cost.

1. Chapter 127, Laws of 1909, providing for the construction of town ditches, requires the petitioners for the ditch to bear the entire expense of establishing and constructing it, and does not impose any liability upon the town. If the statutory prerequisites have been complied with, the contract price for constructing such ditch may be recovered from the petitioners, but cannot be recovered from the town.

### Same — acts of town officers.

2. The town officers, in performing the duties imposed upon them by this law, act as agents of the law and not as representatives of the town.

### Action for contract price — complaint defective.

3. By the terms of the statute the contract price is not payable until the

<sup>1</sup> Reported in 144 N. W. 458.

ditch has been inspected and the inspectors have filed a certificate that it has been completed in accordance with the order establishing it. A complaint which does not show that such certificate was made, nor that the facts were such that the inspectors ought to have made it and refused to do so, fails to state a cause of action.

Action in the district court for Kandiyohi county by the assignee of one Tompkins against Peter Vlaar, Township of Holland and Township of Roseland to recover \$1,014 for the construction of a town ditch. When the case was called for trial, defendant's motion for judgment on the pleadings in behalf of defendant Vlaar, for the reason it did not appear from the complaint that the township had ever accepted the ditch, was granted, Qvale, J. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

*Rieke & Hamrum*, for appellant.

*George H. Otterness* and *J. M. Freeman*, for respondent.

TAYLOR, C.

This is an action to recover the contract price for constructing a town ditch established under and pursuant to chapter 127, p. 120, Laws of 1909.<sup>1</sup> When the cause came on for trial, defendants moved for judgment on the pleadings. This motion was granted and judgment was entered in favor of defendants. Plaintiff appealed.

The only question presented is whether the complaint states a cause of action against defendants or any of them. To determine this question it is necessary to take into consideration both the provisions of the statute and the allegations of the complaint. The statute states the conditions under which a town ditch may be established and prescribes in detail the procedure to be followed. It is too lengthy to give even the substance of its provisions, but a brief statement of some of them may serve to explain the conclusions reached.

The act provides that, before any ditch shall be established, a petition therefor, signed by one or more of the owners of the lands to be benefited, shall be filed with the town clerk of a town in which some part of the ditch is proposed to be located (section 2 [G. S.

<sup>1</sup> [G. S. 1913, § 5634-5671].

1913, § 5635]); that the town clerk with whom the petition is filed shall fix a time and place for the hearing thereon, and shall give notice thereof (section 4 [G. S. 1913, § 5637]); that "the supervisors of all the towns containing lands described in said petition shall meet and hear and consider said petition, acting as one board" (section 5 [G. S. 1913, § 5638]); that if the board, at the hearing, shall find that all the prerequisite conditions exist, they shall make an order establishing and describing the ditch and assessing the benefits and damages therefor (section 8 [G. S. 1913, § 5641]); that "the ditch petitioners shall advance all costs and expenses of said ditch proceeding from its inception to its completion, including damages awarded and the costs of constructing said ditch, which costs, expenses and damages so advanced shall be repaid pro rata to said petitioners as hereinafter provided;" (section 10 [G. S. 1913, § 5643]); that board shall require such security from the petitioners as they may deem necessary (section 11 [G. S. 1913, § 5644]); that the clerk shall "invite bids for the work as one job and also in such divisions as the petitioners may in writing request" (section 17 [G. S. 1913, § 5650]); that "the town clerk shall contract separately in the name of the petitioners, with each party to whom any of such jobs are sold \* \* \* and shall take from him a bond \* \* \* payable to the petitioners for the use of such petitioners," and of all parties injured by any breach thereof (section 17 [G. S. 1913, § 5650]); that "the contractor or contractors may each require the signatures of each of the petitioners to the contract, and if any of the petitioners fail to sign said contract or contracts, said contractor or contractors may require that an amount of money equal to the contract price be deposited with the town treasurer to secure payment of said contract price upon the completion of said contract" (section 17 [G. S. 1913, § 5650]); that the work shall be done and completed under the supervision and subject to the approval of the board (sections 18, 22 [G. S. 1913, §§ 5651, 5655]); that, if the job be not completed by the contractor or his bondsmen, the petitioners may complete the same upon giving bond therefor (section 20 [G. S. 1913, § 5653]); that, if any party refuse to accept the damages awarded, the petitioners may pay the same to the town treasurer (section 21

[G. S. 1913, § 5654]); that the board shall inspect the ditch when advised of its completion, and, if they find it completed according to the contract, shall file a certificate to the effect with the town clerk (section 22 [G. S. 1913, § 5655]); that, upon the filing of such certificate, the contractor shall "be entitled forthwith to payment in full from said petitioners" (section 22 [G. S. 1913, § 5655]); that, upon the filing of such certificate, the town clerk shall make a tabular statement containing, among other things, the amount for which each benefited tract of land is liable, and, after marking all assessments against lands owned by the petitioners or any of them paid, shall file such statement with the register of deeds (sections 23, 24 [G. S. 1913, §§ 5656, 5657]); that such assessments may be paid to the county treasurer, and, if not so paid, shall be included in the next tax list (section 25 [G. S. 1913, § 5658]); that all assessments when collected shall be transmitted to the treasurer of the town in which the petition was filed to be kept by him as a separate fund (section 27 [G. S. 1913, § 5660]); that the compensation and expenses of the different officers and employees "shall be paid by the petitioners from time to time;" (section 34 [G. S. 1913, § 5667]); and that the proceeds of the assessments received by the town treasurer shall be paid pro rata to the petitioners who have paid the cost and expense of constructing the ditch (sections 10, 27 [G. S. 1913, §§ 5643, 5660]).

The complaint shows that, upon a petition signed by defendant Vlaar and one J. J. Maats, the ditch in question was duly established under and pursuant to this law; that the job of constructing it was duly awarded to one J. T. Tompkins; that Tompkins duly entered into a contract and gave a bond to construct the ditch and did construct it; that all amounts due or to become due by reason of the construction of the ditch were duly transferred to plaintiff by Tompkins; that Maats removed to Holland and is not now a resident of this country; that the town clerk duly prepared the tabular statement of assessments provided for in the law and filed the same with the register of deeds; and that such assessments have been paid and the proceeds therefrom are now in the hands of the respective treasurers of defendant towns. The complaint also shows that, under a



contract between Tompkins and certain landowners, the greater part of the ditch had in fact been constructed before it was established as a town ditch, but no claim against such landowners is involved in this action.

Under the law upon which the proceedings in controversy were based, it is clear that the petitioners for the ditch are required to pay the entire cost and expense of constructing it, and that no obligation to pay or advance any part of the same is imposed upon the towns. The towns are not parties to the contract; neither are they, in any manner, parties to the proceeding unless assessed for benefits to the public highways. For the purpose of providing the necessary machinery to carry the law into effect, it imposes various duties upon certain town officers, but, in performing such duties, these officers act as agents of the law, and not as officers of the town. It is well settled that, in such matters, no liability rests upon the municipality unless expressly imposed by law. *Bowler v. County of Renville*, 105 Minn. 26, 116 N. W. 1028; *Merz v. County of Wright*, 114 Minn. 448, 131 N. W. 635. Although the proceeds of the assessment are in the hands of the town treasurer, they are no part of the town funds and must be applied and disposed of as provided by the law. Whether they might be reached by garnishment in an action against the petitioners is not involved in this suit. No cause of action existed against the towns and they were entitled to a judgment to that effect.

Defendant Vlaar is one of the petitioners for the ditch and one of the parties to the contract for its construction. His co-obligor is beyond the jurisdiction of the court. Whether the complaint states a cause of action against Vlaar depends upon whether it shows that the requirements of the statute in respect to the construction of the ditch have been complied with and the contract fully performed. The contract is not set forth in the complaint nor included in the return to this court, and we are not informed as to its provisions. The answer alleges that a copy of the contract is attached thereto, but, as this is denied in the reply, we cannot consider the alleged copy. We may properly assume, however, that the contract is in accordance with the requirements of the statute.

It does not appear that an engineer was ever appointed in these proceedings. The statute provides that if no engineer be appointed, the "ditch shall be constructed under the supervision of the board, which shall have authority to approve the same;" [section 22] that, upon being advised that the ditch is completed, the town clerk shall call a meeting of the board; that thereupon the board, "shall inspect said ditch and if found complete and according to the order establishing the same, shall certify to said fact in writing and file said certificate in the office of said town clerk;" [section 22] and that "the contractor or contractors shall, upon said certificate being filed, be entitled forthwith to payment in full from said petitioners" [section 22]. Under this statute the contractor is not entitled to his pay until the board shall inspect the ditch and shall certify that it has been completed according to the order establishing it. *Moody v. Brasie*, 104 Minn. 463, 116 N. W. 941. Should the board improperly refuse to make such inspection or such certificate, an action could probably be maintained, if such fact be made to appear by proper averments. *State v. Clarke*, 112 Minn. 516, 128 N. W. 1008; *Merz v. County of Wright*, *supra*.

The complaint in question, however, does not show that the board were ever informed of the completion of the ditch, or ever inspected it, or ever made the prescribed certificate; neither does it show that they ever refused to inspect the ditch, or ever refused to make the certificate. To entitle plaintiff to recover, it must appear either that the board made the certificate as provided by the statute, or that the facts were such that they ought to have made it, and that they refused to do so. Neither situation is shown by the complaint, and the decision of the trial court was correct.

Judgment affirmed.

IRVING M. WEISS v. P. N. PETERSON.<sup>1</sup>

December 19, 1913.

Nos. 18,283—(169).

**Grant of new trial — reversal on appeal.**

Where a trial court makes a general order granting a new trial on the ground that the verdict is not justified by the evidence, such order will not be reversed unless the evidence is manifestly and palpably in favor of the verdict. Applying this rule to the evidence in this case, the order appealed from should be affirmed.

Action in the district court for Ramsey county to recover \$11,200 for personal injury. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict in favor of defendant. From an order granting plaintiff's motion for a new trial, defendant appealed. Affirmed.

*Morton Barrows*, for appellant.

*Harvey O. Sargeant* and *J. W. Finch*, for respondent.

HALLAM, J.

Plaintiff sued to recover damages for injuries sustained by reason of the premature starting of a passenger elevator.

The only testimony as to the circumstances of the accident was that of plaintiff and one other witness produced by him. Defendant elicited evidence of circumstances tending to discredit this testimony, and the jury found for defendant. The trial court granted a new trial "upon the ground that the verdict is not justified by the evidence." The propriety of this order is the only question before us for review. The record presents no other.

The attitude of this court on such appeals is well settled. Such an order will not be reversed unless the evidence is manifestly and palpably in favor of the verdict. *Marsh v. Webber*, 13 Minn. 99

<sup>1</sup> Reported in 144 N. W. 450.

(109); Hicks v. Stone, 13 Minn. 398 (434); Hull v. Minneapolis, St. P. & S. S. M. Ry. Co. 116 Minn. 349, 356, 133 N. W. 852.

It would serve no useful purpose to review the evidence in detail. We have examined it with care, and we are convinced that it is not such as to warrant us in disturbing the order of the trial court.

Order affirmed.

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LUELLA HERRICK FISKE v. IZZIE H. W. LAWTON.<sup>1</sup>

December 19, 1913.

Nos. 18,306—(252).

**Agreement to adopt child.**

1. Evidence considered and *held* to show that a child, unrelated to intestate by blood, was taken into the latter's home under an agreement by her and her husband to make such child their child and heir, which agreement was evidenced by a writing subsequently lost.

**Same—degree of proof.**

2. Proofs necessary to establish such agreements must be clear, positive, and convincing in all particulars; relief should be cautiously granted; and each case must rest on its own facts.

**Consent of parent.**

3. Absence of the child's father's consent to the "adoption" *held*, under

<sup>1</sup> Reported in 144 N. W. 455.

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Note.—The authorities on the validity of adoption without consent of natural parents are collated in a note in 30 L.R.A.(N.S.) 146. And as to the constitutionality of a statute permitting adoption of child without consent of parents, see note in 18 L.R.A.(N.S.) 926.

Upon the right of a child adopted in another state to take under local statute of descent or distribution, see notes in 21 L.R.A.(N.S.) 679 and 25 L.R.A.(N.S.) 1285. And on the question of descent and distribution of property of adopted child, generally, see note in 43 L.R.A.(N.S.) 1056.

The question of the legal status of an adopted child is treated in a note in 17 L.R.A. 435.

the circumstances of the case, not available to the legal heir of intestate for the purpose of defeating the child's rights under the contract.

**Agreement valid where made — remedy governed by local law.**

4. The contract was valid in Ohio, where it was made, and when executed, the deceased dying intestate, it entitled the child, pursuant to the equitable maxim that equity regards that as done which ought to be done, to the same share in decedent's estate as a natural child; the remedies thereunder being governed, however, by our laws.

**Inheritance of child's heirs.**

5. Upon the child's death, leaving lawful issue, the latter inherited through her a share in the estate of the deceased "adopting" parent as if she, the "adopted" child, had been a daughter by blood.

**Jurisdiction of probate court.**

6. Intestate's estate having been reduced to personalty, the probate court had power to adjudge to whom the same should be apportioned, and, as an incident thereto, to determine the rights of appellant, the daughter of the "adopted" child, under the contract, and, further, by its final decree, to award to appellant the share of the estate to which she was equitably entitled under the contract whereby her mother was "adopted."

From a decree of distribution in the matter of the estate of Garafilia Herrick, deceased, in the probate court for Hennepin county, George R. Smith, J., Izzie H. W. Lawton appealed to the district court for that county, where the appeal was heard before Leary, J. who made findings and ordered judgment that Luella H. Fiske was not an heir of decedent and was not entitled to any share in her estate and reversed so much of the decree of distribution of the probate court as found that said Luella was an heir and assigned her a share of the estate. From the judgment entered pursuant to the order for judgment, Luella Herrick Fiske appealed. Reversed.

*Frederick H. Boardman*, for appellant.

*William P. Roberts* and *Horace W. Roberts*, for respondent.

PHILIP E. BROWN, J.

Appeal by Luella Herrick Fiske from a judgment of the district court, reversing so much of the decree of the probate court as awarded her a share in the estate of Garafilia Herrick, deceased.

In 1853 and 1854, William W. Herrick and his wife, the deceased,

resided in Ohio, and were childless. Riley and Sarah Ghaston, of the same place, then had a daughter, the mother of this appellant, aged about four years. During the same or the following year, this child was taken into the Herrick family, given their name, brought up by them in their home, and known and introduced as their daughter, and until their deaths sustained to each of them the same relation as an affectionate and loving daughter to her parents. She was, however, unrelated to them by blood. In 1868, or prior thereto, the Herricks moved to Minneapolis, bringing the child with them. On the death of Mr. Herrick, which occurred many years before that of his wife, he remembered the child in his will. She married in 1870 and died in 1877, leaving appellant, her only child, surviving. Mrs. Herrick died intestate in 1911, leaving a purported will, which was refused probate, in which she described appellant as her granddaughter, and attempted to bequeath to her, for life, substantially one-third of her property. Mrs. Herrick's estate having been reduced to money, the probate court, in its final decree, distributed one-half thereof to appellant, and the other to respondent, a daughter adopted under the Minnesota statute long after appellant's mother came into the family. Respondent appealed therefrom to the district court, where the court found most of the facts above stated, those recited and not found being undisputed, and also that appellant's mother was never adopted by Mrs. Herrick, nor taken into the Herrick home upon any agreement by decedent to adopt her; further, that, when the mother was taken into such home, Ohio had no statute under which her adoption could have been accomplished, and she never was adopted. The court concluded that appellant was not an heir of decedent and not entitled to any share in her estate, thus reversing the decree of the probate court.

1. Ohio had no statute under which the child could have been adopted when she was taken into the Herrick home, and no statutory adoption was ever made. If, then, the further finding that she was not taken into their home under any agreement for adoption, and heirship, by decedent, is sustainable, this case is at an end. The proofs in this regard are undisputed, and after careful consideration we have concluded the finding cannot stand. It would serve no useful

purpose to detail the evidence. The only result we can reach therefrom is that the Herricks received this girl from her mother under an agreement to make her their child and heir; and, further, that shortly thereafter an instrument in writing, subsequently lost, was executed in Ohio to evidence the agreement. Unquestionably, proofs necessary to establish such agreements must be clear, positive, and convincing in all particulars. *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656, 106 Am. St. 420. Relief in cases of this kind should be cautiously granted. Each case, however, must rest on its own facts. Neither are we unmindful of the weight to be attached to findings; nor that agreements to adopt do not in themselves create heirship. But here appellant's rights are shown by the testimony of disinterested witnesses, and we find therein no suspicion of taint or interest to induce falsity. Much that is detailed occurred upwards of half a century ago, so literal accuracy is not to be expected. Indeed, particularity in this regard might be a suspicious circumstance.

But there are other considerations tending strongly to establish appellant's hypothesis. Every act of all persons concerned in changing the custody of this child from her natural parents to the Herricks, their subsequent conduct towards her and her relatives, her change of name, their practical adoption of her, and recognition of contractual obligations in their respective wills,—all these must be considered, and are not only consistent with appellant's theory, but inconsistent with any other. The acts referred to, coupled with the testimony concerning conversations, established the agreement as to adoption and heirship. See 1 Wigmore, *Evid.* §§ 267, 272; *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885, 85 Am. St. 480.

The evidence of the child's father's consent to the "adoption" was slight, but this does not avail respondent. If he did not consent he, of course, might have objected and, perhaps, have successfully claimed that his parental rights could not thus be impaired; but there is no evidence in this regard and, even were such the fact, it would not entitle heirs of the "adopting" parent to avoid the "adoption." Doubtless after such long delay even the father would not be heard to object. However, his rights, whatever they may have been in the premises, would not be impaired by permitting the "adopted" child

to succeed to the estate of the "adopting" parent. In *Re Williams*, 102 Cal. 70, 36 Pac. 407, 41 Am. St. 163. Moreover, the deceased voluntarily entered into the contract and pursuant thereto received, during her life, the benefits of the relation thereby created, the services, society, affection, and devotion, of an adopted daughter made her own. No principle of law or equity requires a holding that respondent can avail herself of technical objections to the child's status, the validity of which, so far as appears, remained undisputed by deceased, after full performance of the contractual relations therein involved. See *Lynn v. Hockaday*, *supra*.

2. Respondent contends that "adoption was unknown at the common law, at least in any sense involving a right of inheritance, and it exists in common-law states only to the extent of and by virtue of statutory enactment and the compliance therewith;" further, that the agreement alleged would under no circumstances work an actual adoption or enable the child to inherit from the Herricks, and specifically such follows under the laws of Ohio. For brevity, we will consider these claims collectively.

Adoptions were unknown to the common law, but this is of no special significance. Courts of equity have enforced contracts like the one alleged, whether oral or written, with respect to property rights involved. Such was done in New Jersey, in *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, as early as 1857, without statutory authority. This rule has since been followed in many jurisdictions. In *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L.R.A. 196, proceedings were taken to adopt a child pursuant to a statute subsequently declared unconstitutional. Nevertheless, the court, acting on the theory of an executed understanding for adoption and heirship, and the well established principle that equity should declare that to be done which the parties clearly intended, decreed that title to the real property of the adopting father vested, by reason of the contract, at his decease, in the adopted son, "the same as if he had been the son." In *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 330, 8 L.R.A. (N.S.) 1130, 12 Ann. Cas. 140, the same result was reached after an extended review of authorities, where there was an invalid statutory instrument of adoption. In *Winne v. Winne*, 166 N. Y. 263,



59 N. E. 832, 82 Am. St. 647, an agreement by a childless person with plaintiff's mother to make him, an infant, sole heir, was enforced after performance on his part, as to both real and personal property. See also *Laird v. Vila*, supra; *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59; *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15, 38 Am. St. 379; *Lynn v. Hockaday*, supra; *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609; *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. 653; *Vantine v. Vantine*, (N. J.) 15 Atl. 249, 1 L.R.A. 155; *Kofka v. Rosicky*, 41 Neb. 328, 53 N. W. 788, 25 L.R.A. 207, 43 Am. St. 685. The great weight of authority is that such contracts are not unlawful or against public policy. See note, 88 Am. St. 869. Nor do we find the law otherwise in Ohio. *Clark v. Bayer*, 32 Oh. St. 299, 30 Am. Rep. 593, accords with the views stated. See also *Gray v. Field*, 19 Wkly. Law Bul. (Ohio) 121. In *Wright v. Wright*, supra, 176, it is said the supreme court of Ohio in *Shahan v. Swan*, 48 Oh. St. 25, 26 N. E. 222, 29 Am. St. 517, expressly recognizes the doctrines of *Van Dyne v. Vreeland*, supra, and kindred cases.

We hold the contract valid where made, and when executed, the deceased dying intestate, it entitled appellant's mother, pursuant to the equitable maxim that equity regards that as done which ought to be done, to the same share in decedent's estate as a natural child; the remedies thereunder being governed, however, by our law. 1 Dunnell, Minn. Dig. § 1545. Furthermore, appellant, being the heir of her mother, whose rights under the contract were established by performance prior to her death, had the same right to inherit through her a share of the estate of the deceased "adopting" parent as if her mother were a daughter by blood. Note, 118 Am. St. 688.

3. Had the probate court power to award appellant a share of the estate by final decree? We deem it settled by the weight of authority that this contract, when executed, created an equitable estate in the property of the intestate. Courts, however, have found adjective difficulties in the way of enforcing such contracts, owing to death of the promisor and the absence in some states of statutes like ours—G. S. 1913, § 8027, which however, applies only to district courts—authorizing courts to pass title by judgment. Where land is involved

some courts of general equitable jurisdiction have worked out a remedy by fastening a trust upon the property in favor of an "adopted" child, as against the heir, and enforcing conveyance of the legal title by the latter. 6 Pomeroy, Eq. Jur. § 746. Whether these difficulties are more imaginary than substantial, where real property is in controversy, we need not stop to inquire, nor in what court remedies must be sought. We have here no question of this kind to deal with, nor any problem relating to divesting an heir of legal title; for the estate has been reduced to money, the legal title to which is in the administrator, over whom the probate court has exclusive original jurisdiction. It is true that most, if not all, of the cases cited supra were brought in courts of general equitable jurisdiction, and involved real property. There is a marked distinction, however, between the jurisdiction and powers of our probate courts under the constitutional provision giving them jurisdiction over estates of deceased persons, and probate, surrogates', or ordinaries' courts of other states, which derive all their jurisdiction and powers from statute. This is pointed out by Chief Justice Gilfillan, in *Culver v. Hardenbergh*, 37 Minn. 225, 234, 33 N. W. 792, 797, and in the same case, at page 233, we find the following, quoted from the opinion of Mr. Justice Mitchell in *State v. Ueland*, 30 Minn. 277, 281, 15 N. W. 245, reaffirmed:

"It was clearly the intention of the constitution to give the probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district court jurisdiction over civil cases in law and equity arising out of other matters of contract or tort."

Neither legislature nor courts can add to or take from the constitutional jurisdiction conferred. Within the limitations incident to the subject matters specified by the Constitution, our probate courts possess superior and general jurisdiction, and have implied power to do whatever is reasonably necessary to carry out powers expressly conferred. See cases cited in 2 Dunnell, Minn. Dig. § 7770. Chief Justice Start thus tersely summarized this matter in his dissenting opinion in *Brown v. Strom*, 113 Minn. 1, 11, 129 N. W. 136, 139:

"While they have no general equity powers, yet as respects the

subjects committed by the constitution to their exclusive jurisdiction, they have the plenary powers, legal and equitable, that any court has."

It has been held, furthermore, that with respect to these subjects the constitutional grant of jurisdiction should be liberally construed. *Harrison v. Harrison*, 67 Minn. 520, 70 N. W. 802; *Fitzpatrick v. Simonson Bros. Mnfg. Co.* 86 Minn. 140, 146, 90 N. W. 378.

The circuitry incident to acceptance of respondent's theories is illustrated in the present case, the claim being that the probate court had no jurisdiction in the premises, and the district court, on appeal therefrom, having no greater or different jurisdiction (see authorities cited in 2 Dunnell, Minn. Dig. § 7795), appellant is entitled to no relief in the present proceeding, but must bring an independent action in the district court to establish her rights. As said in *Brown v. Strom*, *supra*:

"The law is concerned not so much with working out an abstract and ideal harmony with respect to the limits of this dual jurisdiction (of district and probate courts) as it is with the efficient administration of practical justice."

Neither can it be said that appellant was a stranger to the estate or not interested in its administration; nor that because a court cannot decree the status of adoption it may not adjudge property rights equitably equivalent to those legally incident thereto. In *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59, L. agreed, in writing and for a consideration, to give and leave, at her death, all her property to K. The latter performed the contract, and L. died, without performing. The probate court was held to have jurisdiction to hear and determine K's claim to the property of L., and also to a distributive share of personalty in an estate of a third person inherited by L., though neither K. nor L. knew, when the contract was made, that such share would ever come to L.; and K. prevailed as to both. See also *State v. Probate Court of Hennepin County*, 112 Minn. 279, 287, 128 N. W. 18; *Sprague v. Stroud*, 114 Minn. 64, 68, 129 N. W. 1053.

We hold the probate court had power to adjudge to whom the pro-

ceeds of this estate should be apportioned, and, as an incident thereto, to determine appellant's rights under the contract.

Judgment reversed.

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CHARLES J. STUMPF and Others v. JOHN W. NORTON and Others.<sup>1</sup>

December 19, 1913.

Nos. 18,317—(137).

**Fraud — findings sustained by evidence.**

1. The evidence sustains the findings that no conspiracy existed between defendants to defraud plaintiffs in their purchase of certain real estate and also that no single defendant was guilty of deception, concealment or fraud in the transaction.

**Broker's commission.**

2. Where the purchasers of real estate made a contract direct with the owners to buy at a stipulated price, then knowing that out of such price the owners were to pay commission to a broker employed by the purchasers' agent to assist in negotiating the deal, such purchasers may not, in the absence of fraud or collusion, recover of such owners any part of this commission.

**Same.**

3. The broker under the facts found was entitled to the reasonable commission the purchasers' agent agreed he should have, since the purchasers, knowing of this employment and that he was to have commission out of the purchase price to be paid the owners, nevertheless, without attempting to learn the amount of such commission, made the contract direct with the owners to purchase at a price which they knew included the broker's pay or commission.

**Action for share of commission.**

4. Since the broker rightfully received the whole of the commission, the purchasers cannot recover from those who subsequently were permitted to share it.

<sup>1</sup> Reported in 144 N. W. 469.

**Reformation of contract.**

5. The purchasers, having made a valid contract with the owners to buy the property for a stipulated price, then knowing that such price included the broker's commission, are not in a position to ask a reformation of the contract so as to reduce the purchase price to the net price given in the first instance by the owners to the broker.

Action in the district court for Hennepin county against John W. Norton and nine others to cancel a certain contract for the sale of real estate, that two other contracts be reformed in respect to the price to be paid by the plaintiffs for the real and personal property therein, and to recover \$9,000 from the defendants Norton, Samdal, Eichorn, Dreger, Thurman and Thwing. The facts are stated in the opinion. The case was tried before Booth, J., who made findings and ordered judgment in favor of defendants. Plaintiffs' motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiffs appealed. Affirmed.

*Charles J. Tryon*, for appellants.

*O'Brien, Young & Stone, Roberts & Strong, and Wright & Matchan*, for respondents.

HOLT, J.

Action by purchasers of real estate against the sellers and the brokers who negotiated the purchase to cancel one contract and reform another relating to the transaction and to recover \$4,000, paid under protest. Plaintiffs appeal from the judgment rendered for defendants.

In March, 1911, the defendants Thurman and Thwing owned the premises known as the Holmes Hotel in the city of Minneapolis. Defendant Thurman died after this action was begun and his executrix has been substituted. Plaintiffs, residents of Milwaukee, who were then negotiating for the lease of a valuable property in Minneapolis assisted by their agent defendant Norton, a real estate broker of St. Paul, learned that the Holmes Hotel was for rent or sale and desired to acquire it. One of plaintiffs directed Norton to buy it for them, if it could be had for less than \$140,000 and arranged so that Norton could procure \$500 to pay earnest money in case the owners

concluded to sell. Norton, who knew or learned that defendant Samdal, in charge of the real estate brokerage for defendants E. Eichorn & Sons, had had the property for sale, sought Samdal's aid in securing the property for the plaintiffs. Samdal went to the owners and they offered to sell for \$135,000 net, but would enter no contract unless \$1,000 was paid down. This was reported to Norton. Samdal also stated that since that price was net to the owners a reasonable commission for his firm must be added, and it was agreed that \$4,000 was proper. Samdal then got the \$500 from Norton and \$500 from his firm, and took the contract in his own name. The contract was shown to Norton. He then gave Norton a contract to purchase containing precisely the same terms except the price was \$139,000 as agreed. The owners knew that Samdal did not buy for himself and that his commission would have to be added to the price paid by the purchasers. Norton took this contract to plaintiffs at Milwaukee, who at first repudiated his act in buying for them. However they told him he should not lose the earnest money and, finally, three of them returned with Norton, examined the property, secured information as to its value and after interviewing the owners offered them \$135,000. The owners refused to consider any price other than \$139,000, because they had promised to protect Samdal's commission.

Plaintiffs returned to Milwaukee without deciding on the purchase, but stated that if they should conclude to buy they would notify the parties by a certain time. Within the time set they notified Norton and Samdal to meet them at the Holmes Hotel; and after some dickering, and obtaining more time in which to make the deferred payments, plaintiffs made a contract direct with the owners to pay \$139,000 for the property. Previous to closing the deal there was no agreement between Norton and Samdal that the former should have any part of the commission, and the owners did not have any agreement with Samdal that they should receive any more than \$135,000 net. Some time after the deal was closed and a considerable portion of the purchase price was paid, Samdal asked the owners for the commission. They demurred to paying all, stating that, since they had been obliged to make concessions as to the time of deferred pay-

ments and had had additional trouble in closing the deal, he ought to be satisfied with \$3,500. Samdal consented and at the same time directed them to pay one-half of that sum to Norton, having in the meantime agreed to share with him. The owners paid E. Eichorn & Sons \$1,750 and Norton \$1,750. Plaintiffs all the time understood that they were not to pay either Norton or Samdal commission, and knew that Samdal expected to be paid by the owners. One of the plaintiffs testified that before the deal was closed he inquired of Norton how much he would get in the way of commission, but Norton then told him he did not know whether he would get anything. Before the last of the deferred payments fell due plaintiffs learned that the owners had given Samdal a net price of \$135,000 and demanded a conveyance on payment of that sum. The owners refused, and plaintiffs paid the last \$4,000 under protest. The court found that the reasonable value of the property was \$140,000 and that \$4,000 was a reasonable commission.

The theory of the case as set out in the complaint was that defendants had conspired to defraud plaintiffs. But we are entirely in accord with the conclusion of the trial court that no conspiracy is shown and further that no one of the defendants was guilty of duplicity or fraud. So that if plaintiffs are to prevail it must be on the ground that the acts of Samdal and Norton constitute a legal fraud notwithstanding their entire good faith.

We see no principle upon which the owners can be held. Plaintiffs all knew that Samdal expected commission out of the purchase price to be paid by them, yet they sought no information either from the owners or Samdal as to the amount. It is worthy of note that plaintiffs practically ignored Samdal or looked upon him as representing the owners. They insisted on dealing with the owners direct and made them offers. And finally closed the deal with the owners, making a contract direct with them. This was on more favorable terms than obtained by Samdal as to time of deferred payments. This, together with the extra time which the owners were obliged to give to the deal, would seem to show good consideration for the increase in the net price first quoted by them, if, indeed, such were needed. And from another view point it would seem but just that

Samdal should reduce the commission they were to pay him out of the purchase price. Furthermore, if plaintiffs cannot question Samdal's right to retain the \$4,000, it would seem to follow that he may dispose of it as he sees fit. This statement is made in view of the finding that all defendants acted in good faith, with no intent to make a secret profit at the expense of plaintiffs. We may concede that some of the facts and circumstances tend in the direction of collusion and fraud, but the court found otherwise, and, we think, rightly.

As to Samdal and Norton the action must be determined solely upon Samdal's right to commissions. If he forfeited the right thereto, plaintiffs may recover from Norton who received a part with full knowledge of all the facts. From the start Samdal insisted on commissions. Norton testified: "Before I got a price on it at all, but after different negotiations that he (Samdal) seemed to have, I called there back and forth, he came back and he said, 'I am satisfied I can get that at \$135,000 net to the owners, and I will have to add my commission.' 'Well,' I said, 'what will that be?' and he said, 'Let's say a fair commission, \$4,000, make it \$139,000' and I said, 'all right; go ahead and get it.'"

Plaintiffs were experienced business men, had dealt in real estate, and were well acquainted with the custom of brokers and real-estate agents to look to their commissions, at least from one side, in every deal. They admit that they suspected Norton was making a handsome thing of it and inquired of him, but claim that he said he was not getting anything, and this was true at the time he was asked. At any rate, they understood perfectly that they were not to compensate either Norton or Samdal. Even if plaintiffs believed that Norton would work gratuitously in this deal, because of some expectation of reward in the other large transactions he had then pending for them, they admittedly knew that Samdal was to receive his pay from the vendors. Knowing that the price they were paying included commissions to Samdal, they evinced not the slightest interest in ascertaining the amount until some time after the transaction was closed.

We are not disposed to relax in any manner the wholesome rule



which requires an agent to be absolutely true to the interests of his principal. Any attempt by an agent to profit by devious, hidden schemes, or to secretly serve the other party to the bargain, or a failure to disclose that which is for the interest of the principal to know, forfeits the right to compensation and calls for a restoration of anything of value thus wrongfully secured. The law exacts the strictest good faith from the agent. His pecuniary interests must not interfere with his duty toward his principal. We are well aware that this does not always hold good in practice. And perhaps it is true that in no field of agency are there more flagrant and frequent infractions of the rule stated than among real-estate brokers. However, that very fact demands rigorous application of the law.

But an agent is worthy of his hire. And the one to pay it is usually the one who has the right to demand the loyal service. It is an anomaly to consider a person the agent of one party to a transaction when such party insists that he shall obtain his reward from the other side. What kind of service ought a man to get who employs an agent to serve his interests in a deal, but insists that the agent look to the other side for his pay? One who thus acts subverts and undermines the principles underlying the efficient, faithful and disinterested service demanded of agents. However, conceding that Samdal was employed by plaintiffs as their agent but was to receive his pay from the sellers of the property, we, nevertheless, think he was entitled to his commission. Plaintiffs employed him, if at all, through Norton. Samdal disclosed everything to Norton. It is well settled that an agent does not forfeit his right to the agreed commission in a real-estate deal, although he has accepted some compensation from the other side, provided his principal knew of this when the transaction was closed. See the cases cited in the exhaustive note to *Leathers v. Canfield*, 45 L.R.A. 33. Applying this principle here where the so-called employers knew before they bought that the whole compensation of Samdal was to come from the other side, what right have they now to deprive him of his commission, especially since they then were indifferent as to the amount, and the amount is reasonable?

Appellants have cited cases which state the fiduciary duties of agents in apt and forceful language, and as applied to the facts of

each case the result is eminently just. But in none of the cases are the facts similar to those here involved. In *Whitehead v. Linn*, 45 Col. 427, 102 Pac. 286, the agent induced his principal to enter a contract to buy a lot for \$1,250, and then went to the owner and bought the lot himself with his principal's money for \$850, without letting her know that he had so done. She was permitted to recover. *Deter v. Jackson*, 76 Kan. 568, was a case of actual fraud and concealment by the agent of the fact that he was interested with the other purchasers in acquiring the property. This was held to forfeit the commission the seller had agreed to pay him. In *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211, the agent prevailed, although there was concealment of a material fact during the negotiations, because the principal learned the true situation before the transaction was closed. So here, before the transaction was closed, appellants knew Samdal's position and that he was to have a commission out of the \$139,000 which they agreed to pay for the property. *Porter v. Woodruff*, 36 N. J. Eq. 174, involved profits made by deception and concealment on the part of the defendant, who because of his intimate friendship with the plaintiff and her deceased husband had undertaken to transact plaintiff's business as his own and without any expectation of pay. The case which comes perhaps the nearest being authority for plaintiff's contention is *Hutchinson v. Fleming*, 40 Can. Sup. Court, 134, but it will be noticed that the decision is largely placed on the presence of subterfuge and double dealing on the part of the agent.

As bearing upon plaintiffs' right to a reformation of the contract to purchase so as to make the purchase price \$135,000, as well as upon the recovery of damages, it would seem that the rule announced in *Tilleny v. Wolverton*, 54 Minn. 75, 55 N. W. 822, should be applied. In that case the husband of plaintiff employed defendants to sell a tract of land for her. The agents made a sale, but informed the husband that in order to make it they had agreed with the purchasers to take an undivided one-fourth interest in the land. The deed was given by plaintiff and her husband to one of the purchasers who thereafter conveyed for a large increase in price shared in by plaintiff's agents to whom she had paid commissions. She sued the agents

to recover the secret profits, claiming that she had no knowledge that her agents were interested in the purchase. After stating that it was not necessary that she should have full knowledge of all the details as to the extent of her agents' interest in the purchase in order to conclude her by ratification, the court says:

"The important and material fact for her to know was that her agent was interested as purchaser in the proposed sale of her property, and therefore that his interests did or might conflict with hers. If, with the knowledge of this fact, she saw fit to approve of the sale, deliver her deed, and accept the purchase money without inquiry as to the extent of his interest, or as to the details of the arrangement between him and the other purchasers, she must be deemed to have deliberately ratified upon the knowledge she had without caring for more."

Here plaintiffs, with full knowledge that Samdal was to have commission out of the \$139,000, deliberately executed the contract with the owners to pay that price for the property, without seeking any information as to the amount of such commission. Thereby they ratified the acts of Norton in employing Samdal and the terms of employment, and cannot question the validity of their own contract with the owners as to the purchase price therein stipulated. See also *Bartleson v. Vanderhoff*, 96 Minn. 184, 104 N. W. 820.

From a careful perusal of the testimony we feel confident that the court below disposed of the issues correctly both as to law and facts.

Judgment affirmed.

NANCY B. GLIDDEN v. WILLIAM E. GOODFELLOW  
and Another.<sup>1</sup>

December 19, 1913.

Nos. 18,331—(149).

**Landlord's covenant to repair—duty to third person.**

1. Where the landlord by the terms of the lease expressly contracts to keep the leased premises in repair, a legal duty thereby arises on his part toward third persons lawfully upon the premises to perform the contract, and a negligent failure to do so, which results in injury to such third person, renders him liable for such damages as may have been suffered in consequence of his negligence.

**Covenant to keep heated.**

2. The rule applies to a case where the landlord contracts to keep the leased premises properly heated, and his negligent failure to perform the contract renders him liable to a servant of the tenant who suffers injury in consequence of the neglect.

Action in the district court for Hennepin county to recover \$25,000. From an order Hale, J., sustaining the demurrer of defendant Goodfellow, plaintiff appealed. Reversed.

*Spooner, Laybourn & Lucas*, for appellant.

*William Furst*, for respondent.

BROWN, C. J.

The facts in the case, reduced to their last analysis, as shown by the allegations of the complaint, and so far as here important, are as follows: Defendant Goodfellow by a lease of certain premises to the Smith Typewriter Co., to be occupied by the tenant as a dealer

<sup>1</sup> Reported in 144 N. W. 428.

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Note.—On the question of the effect of landlord's breach of contract to repair on his liability to tenant's guests or servants from defects in premises, see note in 17 L.R.A.(N.S.) 1163.

As to the duty and liability of landlord of apartment as to heating, see note in 37 L.R.A.(N.S.) 1213.

in typewriters and typewriter supplies, covenanted and agreed to supply the premises with heat during the cold weather season from a heating plant owned and operated by him. The tenant took possession under this contract, and the covenant to heat the same was in part the consideration of the rents agreed to be paid for the use of the premises. Defendant negligently and carelessly, so the complaint alleges, failed properly and suitably to heat the premises and thereby committed a breach of the contract. Plaintiff was in the employ of the tenant, and in the performance of her duties was obliged to be within and about the premises. By reason of the failure of defendant properly to heat them, plaintiff contracted a severe cold which developed into tuberculosis, from which she has since suffered and which she alleges has permanently impaired her health. She therefore demands judgment for the sum of \$25,000. Defendant Goodfellow interposed a general demurrer to the complaint, and plaintiff appealed from an order sustaining the same.

The only question presented is whether defendant Goodfellow, the landlord, having expressly contracted in and by the terms and provisions of the lease to keep the leased premises suitably heated, is liable to a servant of the tenant for his negligent failure to comply with the contract in that respect.

There is much confusion and conflict in the authorities upon the question, which we make no effort to reconcile or explain, though a few observations in respect to the divergent views of the different courts may not be out of place.

The courts are practically in accord in holding the landlord not liable to an employee of the tenant, his guest or patron, for injuries received in person or property, from a defective condition of the leased premises arising subsequent to the date of the contract, except where the landlord has expressly contracted by the terms of the lease to keep and maintain the premises in repair, or the duty or obligation to do so is imposed by statute, and except perhaps in other special instances, as to total strangers to both the landlord and tenant, not necessary here to point out. 1 Tiffany, Landlord & T. § 97, et seq., and authorities there cited. Many of the courts both of this country and England hold to the rule of nonliability even where the land-

lord has contracted to repair, the theory of the decisions being that the failure of the landlord to make repairs constitutes a breach of the contract, and since the injured third person was not a party to the contract he can have no action for a breach of the same. *Burdick v. Cheadle*, 26 Oh. St. 393, 20 Am. Rep. 767. The authorities upholding this view of the law have the support of Judge Freeman in a note to *Griffin v. Jackson L. & P. Co.* 92 Am. St. 496, wherein all the authorities are collected and cited. He there said that, "on principle, the view that the contract by the landlord to keep the premises in good repair gives no right of action to a stranger to the contract seems preferable. It is in accord with the general principle that one cannot sue on a contract to which he is not a party." But there are numerous authorities wherein it is broadly stated that the landlord is liable directly to the servants and patrons of the tenant in such cases, the theory being that since the tenant is liable to his servant or patron, and the landlord is in turn liable over to the tenant, a circuit of action is avoided by permitting the injured third person to proceed against the landlord direct. 1 *Tiffany, Landlord & Tenant*, § 107. A distinction between "third persons" who are total strangers to both the landlord and tenant, and those who are upon the premises at the invitation of the tenant, is made by the authorities applying this rule. Note, 92 Am. St. 508, subd. 3. Very few cases have arisen in this country calling for an application of the rule, as pointed out by Mr. Tiffany, *supra*, and it has its origin perhaps in the dictum of the courts in cases where there was no contract to repair, wherein the courts have broadly stated that there is no liability "unless the landlord has agreed to repair," leaving the inference that there is liability if there was a contract to repair. But however established, it has been firmly engrafted on the law as an exception to the general rule of nonliability in such cases, and has thus become of itself an affirmative rule of liability. The soundness of the theory supporting the rule, avoidance of circuit of action, has been and may well be questioned, for it is clear on principle that, to authorize a suit by the injured party directly against the landlord, there should appear either the violation of some contract right, to which contract the injured person was, directly or indirectly, a party, or the violation

of some legal duty arising from the landlord to him. The mere fact that circuity of action will be avoided by permitting the action against the landlord would seem not enough to vest in the third person the right of action.

But we think the true basis for the liability, as respects the servants and others upon the premises at the invitation of the tenant, must be found in an implied legal duty on the part of the landlord to keep and perform his contract for their benefit and protection. They have of course no remedy on the contract, for they are not parties to it and are strangers to its obligations. The sole remedy is an action for the wrong committed by the landlord, by his negligence in failing to perform an act assumed by him, which he was bound under the circumstances to know would protect them from harm if performed, or expose them to injury if not performed. A case like that at bar might well be held to come within the rule applicable to property leased for public purposes: Wharves, concert and public entertainment halls, and the like. In such cases the negligent failure of the landlord to perform his contract with the tenant to keep the premises in repair renders him liable, and the authorities hold to the rule of liability even in the absence of express contract to repair. 92 Am. St., note on page 513; *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620; *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92.

In the case at bar the premises were adapted to and were leased for commercial purposes, namely: The conduct of the tenant's business as a retail dealer in typewriters and typewriter supplies. The character of the business was stated in the lease and necessarily it was within the contemplation of the parties that the tenant would employ clerks and servants, and that the public generally would resort to the premises for the purpose of dealing with the tenant. In such a case persons going upon the premises for the lawful purpose of dealing with the tenant would be entitled to protection from dangers arising from the lack of proper repairs, and it would clearly be the duty of the landlord as well as the tenant to exercise reasonable care to avoid injury to them in that respect. This duty on the part of the

landlord would arise from his express contract with the tenant, for in contemplation of law it was made to ensure the safe condition of the premises for the transaction of the tenant's business therein. An agreement to keep the premises properly heated, and the negligent failure to perform the same, cannot on principle be differentiated from the case of failure to keep in repair. The purpose of the undertaking by the landlord was to maintain the premises in habitable condition, not only for the tenant, but also for his employees. The contract created an implied legal duty on the part of the landlord toward the employees to keep and perform the same, and a negligent violation thereof ought to vest in them the right of action against him, if such neglect be the proximate cause of the injury sustained and the employees be not guilty of contributory negligence, or assume the risks incident to continuing in the employ of the tenant in the unheated premises. The employee cannot of course, in any such case, have any greater right than the contract confers upon the tenant. Note, 92 Am. St. 509, subd. 4.

The case is distinguishable from those wherein it is held that a water company, under contract with a municipality to furnish to its citizens a sufficient supply of water for domestic and fire purposes, is not liable to an individual for a failure to perform the contract, either in tort or for the breach of the contract. The weight of authority upholds that rule, (*Howsmon v. Water Works*, 119 Mo. 304, 24 S. W. 784, 23 L.R.A. 164, and note 41 Am. St. 654) though the liability of the water company has been affirmed by some courts of high standing, the basis and reasoning of which, namely: An implied legal obligation to third persons, sustains on principle the view we take of the question in this case. *Pond v. New Rochelle Water Co.* 183 N. Y. 330, 76 N. E. 211, 1 L.R.A. (N.S.) 958, 5 Ann. Cas. 504; *Gorrell v. Greenboro Water Supply Co.* 124 N. C. 328, 32 S. E. 720, 46 L.R.A. 513; *Duncan v. Owensboro Water Co.* 12 Ky. L. 35, 12 S. W. 57; *Guardian T. & D. Co. v. Fisher*, 200 U. S. 57, 67, 26 Sup. Ct. 186, 50 L. ed. 367. As remarked by Mr. Justice Brewer in the last case cited:

"One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are inter-



ested and for negligence in which he is liable in damages to such other parties."

But we need not pursue the subject further. Whether this theory of the true ground of liability be sound or unsound, our former decisions it would seem, though without any particular discussion of the question, logically place this court in line with those holding the landlord liable to third persons lawfully upon the premises, where he has by the terms of the lease expressly contracted to keep and maintain them in repair. There can be, as already stated, no distinction between a contract to repair, and one to keep the premises properly heated, and our former decisions apply to the facts here presented. *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Williams v. Dickson*, 122 Minn. 49, 141 N. W. 849; *Good v. Von Hemert*, 114 Minn. 393, 131 N. W. 466; *Nash v. Minneapolis Mill Co.* 24 Minn. 501, 31 Am. St. 349. In the *Barron* case the landlord agreed to keep the premises in repair and for his negligent failure to do so he was held liable to a sublessee of the tenant, and to all persons lawfully upon the premises at the invitation of the tenant. It was there urged, as it is in the case at bar, that there was no contractual or other relation between the landlord and the injured party and, therefore, that there could be no liability. The contention was not sustained. In the *Dickson* case the liability was held to extend to a servant of the tenant, and in the *Good* case to a member of his family. We are not disposed to question the soundness of these decisions and follow and apply them to the case at bar. Authorities supporting the decision in the *Barron* case will be found in a note to *Dustin v. Curtis*, 11 L.R.A.(N.S.) 504, 507.

This disposes of the case. The question whether the damages claimed by plaintiff in consequence of the tuberculosis alleged to have resulted from the cold contracted by reason of the unheated premises are too remote, what other damages she may be entitled to, if any, or whether she assumed the risk of continuing in the employ of the tenant with knowledge of the condition of the premises, we do not consider. Such questions are not presented. We dispose of the case upon the single question whether, under the facts pleaded, lia-

bility on the part of the defendant is shown. All other questions must be determined when issue is joined and the cause tried.

Order reversed.

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CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. VILLAGE OF LE ROY.<sup>1</sup>

December 19, 1913.

Nos. 18,365—(216).

**Village — act applicable.**

1. *Held*, following *State v. Cornwall*, 35 Minn. 176, that by chapter 14, Sp. Laws 1876, the village of Le Roy became incorporated as a village under and subject to the provisions of the general village act of 1875, the same being chapter 139, general laws of that year, and therefore comes within the scope of section 2, chapter 145, Laws 1885.

**Same.**

2. Chapter 145, Laws 1885, relating to the incorporation of villages, and providing that all villages theretofore incorporated under the general statutes of the state should be governed by the provisions thereof, though repealed by section 5536, R. L. 1905, nevertheless by force of section 698, R. L., remains in force as to existing villages, which were not reincorporated as provided for by section 699, R. L. 1905.

**Necessity of new street.**

3. The evidence supports the verdict to the effect that a proposed new street over the railroad right of way is a public necessity.

**Cost of new street.**

4. The entire cost and expense of extending the new street across the right of way, including necessary planking over the railroad tracks, was properly imposed upon the railroad company; following *State v. St. Paul, M. & M. Ry. Co.* 98 Minn. 380, and *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 115 Minn. 460, and overruling upon this point *State v. District Court for Hennepin County*, 42 Minn. 247.

<sup>1</sup> Reported in 144 N. W. 464.

From the award of damages in the condemnation of land belonging to the Chicago, Milwaukee & St. Paul Railway Co. in certain proceedings to extend a street in the village of Le Roy across the right of way of the company, that company appealed to the district court for Mower county. The appeal was heard in the district court before Kingsley, J., who denied plaintiff's motion for a dismissal of the proceeding for want of jurisdiction of the court and its motion for a directed verdict in its favor, and a jury which returned a verdict that it was a public necessity to take for street purposes the land described in the proceedings and assessed the damages to be paid by the village of Le Roy at \$550. From an order denying plaintiff's motion for judgment in its favor notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*Catherwood & Nicholsen*, for appellant.

*Sasse & French*, for respondent.

BROWN, C. J.

The village council of the village of Le Roy, in Mower county, duly adopted a resolution laying out and establishing a street over and across the right of way of appellant, the proceeding being conducted under the provisions of chapter 145, p. 148, Laws 1885. The questions in issue were heard before a justice of the peace and a jury where the right of the village to open the street was affirmed. The railroad company appealed to the district court where a verdict was returned again sustaining the proceeding. The company then moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from an order denying the same.

It is contended by appellant: (1) That the village of Le Roy is without authority to lay out or establish public streets or highways, and therefore that the proceedings are a nullity and should be dismissed; (2) if it have such authority, that there exists no public necessity for the street in question, and that the verdict of the jury affirming such necessity is without support in the evidence; and (3) that the trial court erred in excluding certain evidence of damages sustained by the appellant, resulting from opening the street across its tracks.

We are unable to sustain either of these contentions.

1. The village of Le Roy was incorporated by chapter 14, p. 77, Sp. Laws 1876, which declared that the territory therein described "is hereby set apart and incorporated as the village of Le Roy, under the provisions of chapter one hundred and thirty-nine of the general laws of 1875." Neither the act incorporating the village, the special law just cited, nor chapter 139, p. 170, Laws 1875, by which its municipal authority was intended to be measured, conferred any power upon the village to lay out or establish public streets or highways, and herein is found the basis of the claim that the village is now without such power. The contention is sound, unless the village continued as a municipal corporation after 1885 under and with the power and authority conferred by chapter 145 of the laws of that year, which expressly grant this power to villages incorporated thereunder. That statute was intended as a general law for the incorporation of villages of the state, and the reincorporation of existing villages by a compliance with the provisions thereof, though the statute provided that existing villages incorporated under special laws should continue thereunder, unless they elected to reincorporate under that act.

It is the contention of appellant that the village of Le Roy was incorporated under a special law and, since it was never reincorporated under the act of 1885, its sole authority must be found in the act of incorporation. On the other hand respondent contends that it was in fact incorporated under the general village act of 1875, and that its continuance as a village was provided for by section 2 of the act of 1885. We sustain respondent's contention. In fact the precise question was involved in the case of *State v. Cornwall*, 35 Minn. 176, 28 N. W. 144, and it was there held that the village of Pine Island, incorporated by special act, substantially like that incorporating Le Roy, was incorporated under the general laws of 1875, and was continued as a village by force of section 2 of the act of 1885. The facts in respect to both villages are substantially the same, and the case referred to controls that at bar. The question is there discussed and requires no further comment. See also *Flynn v. Little Falls Ele. & Water Co.* 74 Minn. 180, 77 N. W. 38, 78 N. W. 106. While,

as appellant contends, the act of 1885 was expressly repealed by the general statutory revision of 1905, (section 5536), such repeal was subject to the qualifications found in section 698, R. L. 1905, wherein it is provided that until reorganized, as provided for by section 699, the several villages, existing as such at the time the revised laws took effect, whether under special or general law, "shall continue thereunder and in all things continue to be governed by such general or special laws." The effect of the general repeal of the act of 1885, coupled with this reservation, was to repeal the act as to future incorporations, but to continue it in force as to existing villages. It follows, therefore, since chapter 145 grants to villages, organized thereunder or governed thereby, the power to lay out and establish streets and highways, that the village of Le Roy possesses the power and may rightfully exercise it.

2. It is contended that there is no public necessity for the establishment of this particular street, and that the verdict of the jury to the contrary is manifestly against the evidence. In this we do not concur. The question of public necessity in such cases is legislative and to be determined by the tribunal to which it is delegated. The authority of the court in the review of such determination is limited to the inquiry whether the evidence upon the question is practically conclusive that no public necessity exists for the improvement. *Fohl v. Common Council of Village of Sleepy Eye Lake*, 80 Minn. 67, 82 N. W. 1097; *Minneapolis & St. Louis R. Co. v. Village of Hartland*, 85 Minn. 76, 88 N. W. 423; *School District No. 40 v. Bolstad*, 121 Minn. 376, 141 N. W. 801. See also citations in 22 L.R.A.(N.S.) 71. Our examination of the record in the case at bar discloses sufficient evidence to sustain the verdict.

3. At the trial below appellant offered to show, as elements of the damage it claimed to be entitled to recover for laying the street over its right of way, the cost of planking the crossing, the cost of sidewalks, and for culverts and drainage. All this evidence was excluded, and appellant's damage limited to the value of the land taken for the new street. The rulings of the court in this respect are challenged as error, for which it is claimed a new trial should be granted.

The contention of appellant that it is entitled to at least some of these items is sustained by the case of *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7, and reliance is placed thereon in support of the appeal. The decision in that case, however, no longer expresses the law of the state upon this particular question, for it was in effect overruled in *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 115 Minn. 460, 133 N. W. 169. The fact that the decision in *State v. District Court for Hennepin County* upon the particular point was not in harmony with the rule applied by the great majority of the courts, both state and Federal, was pointed out in *State v. St. Paul, M. & M. Ry. Co.* 98 Minn. 380, 108 N. W. 261. In that case we held that the overhead bridge there in question was wholly a safety device, the entire expense of which could lawfully be imposed upon the railroad company, and the rule of *State v. District Court for Hennepin County*, as to the cost of planking the crossing, was not in point, yet we took occasion to say that it was in direct conflict with the decision of other courts. But in the case of *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, just referred to, the elements of compensation claimed by the railroad company extended far beyond the matter of mere safety, yet the entire cost was held properly imposed upon the railroad company, notwithstanding the rule laid down in *State v. District Court for Hennepin County*. It was again pointed out by Mr. Justice Simpson that the rule of that case was not in accord with the authorities, and the decision rendered was a distinct departure from that case. So that as heretofore stated *State v. District Court for Hennepin County* should be understood as overruled. The reasons leading to this conclusion are so fully stated in the later decisions as to render further elaboration unnecessary. And we hold, without further discussion, that appellant is not entitled to the damages claimed and that the trial court properly excluded evidence thereof.

Order affirmed.

CROOKSTON STATE BANK v. E. C. LEE and Another.<sup>1</sup>

December 19, 1913.

Nos. 18,370—(138).

**Attachment.**

A preferential transfer or payment, without actual fraud, does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize the issuance of a writ of attachment under R. L. 1905, § 4216 (G. S. 1913, § 7846).

From an order of the district court for Polk county, Watts, J., denying the motion of defendants E. C. Lee and W. B. Lee to dissolve an attachment levied upon certain premises described in the motion, they appealed. Reversed.

*Ole J. Vaule and William P. Murphy*, for appellants.

*A. A. Miller*, for respondent.

**DIBELL, C.**

The defendants E. C. Lee and W. B. Lee appeal from an order denying their motion to dissolve a writ of attachment issued under R. L. 1905, § 4216, (G. S. 1913, § 7846). The ground of the writ was their disposition of their property with intent to delay and defraud their creditors.

Abbreviating the facts and omitting those not essential to the application of the controlling principle of law and stating them favorably to the contention of the plaintiff, the situation is about this: On April 5, 1913, when the attachment issued, the Lees through an assignment from Hattie L. Ross, their sister, had a contract with one Holte for the purchase of a quarter section in Polk county. Some payments had been made, the Lees were in possession, and they were the equitable owners. Holte's claim was \$4,725. The Lees pro-

<sup>1</sup> Reported in 144 N. W. 433.

Note.—For authorities on the question as to what intent to defraud will sustain an attachment, see note in 30 L.R.A. 465.

posed selling their equity to Holte for \$3,000. They intended to apply \$1,700 of this in payment of a debt owing the First National Bank of Crookston which was secured on the land, \$48.84 in payment of a tax lien, and the balance of \$1,251.16 upon a debt of \$1,338 to their sister. This debt was the portion remaining of the initial payment of \$1,800 which Mrs. Ross had made in 1904 when she entered into the contract with Holte. She claims that it was secured upon the land. It is unnecessary to determine this. Concededly it was an honest debt.

It is upon this contemplated payment to Mrs. Ross that the plaintiff rests its right to an attachment.

The transaction outlined amounts to nothing more than a preferential payment.

The transfer with intent to delay or defraud creditors contemplated by the attachment statute is a transfer fraudulent as to creditors at common law, or under statute 13 Eliz., or under our statute, R. L. 1905, §§ 3495-3504, (G. S. 1913, §§ 7010-7019). Preferential payments and transfers are void only when an insolvent or bankrupt law makes them so, and then only in aid of an insolvent or bankruptcy proceeding. *Smith v. Deidrick*, 30 Minn. 60, 14 N. W. 262; *Berry v. O'Connor*, 33 Minn. 29, 21 N. W. 840; *Mackellar v. Pillsbury*, 48 Minn. 396, 51 N. W. 222; *Dyson v. St. Paul Nat. Bank*, 74 Minn. 439, 77 N. W. 236, 73 Am. St. 358.

We do not mean to say that a transfer which works a preference may not at the same time be actually fraudulent as to creditors. It may be; and a preferential transfer may be avoided because of actual fraud inhering in it though not avoidable as a preference, or because of such fraud it may be the basis of an attachment. *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. ed. 429; *Hobbs v. Greenfield*, 103 Ga. 1, 30 S. E. 257; *Holt Mfg. Co. v. Thomas*, 69 Wash. 488, 125 Pac. 772. Such a situation was in mind in *First Nat. Bank v. Anderson*, 101 Minn. 107, 111 N. W. 947, where an attachment was sustained because lurking in a preferential transfer was found an intent to delay and defraud creditors. Where there is a simple preference, and nothing more, a preferential transfer or payment does not sustain an attachment. *Campbell v. Warner*, 22 Kan. 604; *John-*



son v. Stockham, 89 Md. 358, 43 Atl. 920; First Nat. Bank v. Steele, 81 Mich. 93, 45 N. W. 579. The case at bar is such a case. Order reversed.

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RAYMOND L. BRASCH v. JOHN C. REEVES and Others.<sup>1</sup>

December 19, 1913.

Nos. 18,381—(115).

**Specific performance — evidence.**

In an action for the specific performance of an alleged oral agreement by parties now deceased to leave their property to the plaintiff at their death, it is *held* that the evidence justifies but does not require a finding that such an agreement was made; that it does not justify a finding that a part only of their property was the subject of the agreement; and that under the evidence the court might have found either that there was no agreement warranting specific performance, or that, if there was such an agreement, it included all of the property owned at their death, but could not find that there was an agreement embracing less than all.

Action in the district court for Chippewa county to adjudge plaintiff to be the absolute owner of all property which belonged to Rachel J. Brasch, deceased, and to enforce specific performance of a verbal agreement between his mother and Rachel J. Brasch and her husband. The answer of the administrator of the estate of Rachel J. Brasch, deceased, alleged that neither the contract, if any there was, for the conveyance of lands and personal property, nor any note or memorandum thereof expressing the contract and consideration was ever in writing and subscribed either by Frederick W. Brasch or Rachel J. Brasch, his wife. The case was tried before

<sup>1</sup> Reported in 144 N. W. 744.

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Note.—The authorities on the specific performance of a contract to leave property to child in consideration of his living with promisor are reviewed in a note in 44 L.R.A.(N.S.) 756.

Qvale, J., who made findings and ordered judgment in favor of plaintiff as to certain land in Chippewa county; and in favor of the heirs at law of said Rachel as to the residue of decedent's property. From the judgment entered pursuant to the order for judgment, all parties appealed. Reversed and new trial granted.

*Daly & Barnard and Bert O. Loe, for plaintiff.*

*E. M. Webster and Fosnes & Fosnes, for defendants.*

DIBELL, C.

This action is brought by the plaintiff to enforce specific performance of an alleged verbal agreement whereby he was to have the property of Frederick W. Brasch and Rachel J. Brasch, husband and wife, at their death. Frederick W. Brasch died June 2, 1906, and Rachel J. Brasch died July 5, 1911. Both died intestate. Upon his death all of Brasch's property passed by the decree of the probate court to Rachel J. Brasch. The heirs at law and the administrator of Rachel J. Brasch are the defendants. Judgment was entered adjudging by way of specific performance that the plaintiff was the owner of certain property in Chippewa county of which Rachel J. Brasch died seized; and that the defendant heirs were the owners of the rest of her property. The plaintiff and the defendants appeal.

The Brasches were childless. For many years they lived upon a farm in Renville county. The plaintiff was born there on June 18, 1884. When he was about one and one-half years old, and after the death of his father, his mother, who was about to marry, claims to have made an agreement with the Brasches, with whom she had herself lived since she was two years old, relative to the care of her child. She claims that they wanted to keep him, and agreed that if she would leave him with them they would rear and educate him as their own and would leave him their property at their death. Soon afterward she married, after a few years went west, and passed out of the lives of her son and the Brasches. The plaintiff was reared by the Brasches and the ostensible relation between them was that of parent and son. He was not told that they were not his parents and he supposed that they were. He lived with them until the death

of Mr. Brasch and afterwards lived with Mrs. Brasch until her death.

The court found that the Brasches took the plaintiff under an agreement with his mother that, if she would leave him with them, they would rear and educate him, and after they were through with their property they would give the child what they had left. This finding is justified. The court further found that the property in contemplation was the property upon which they then lived in Renville county. This finding is not justified. Under the evidence there was an agreement that the plaintiff should have all of the property owned by the Brasches at their death or there was no agreement. Pursuant to its finding that the agreement related to the Renville county farm, the court decreed to the plaintiff the home farm in Chippewa county which it is assumed came from the proceeds of the Renville county farm which was sold prior to the death of Brasch. In addition to the land decreed to the plaintiff, Mrs. Brasch died seized of considerable other property which was decreed to the defendant heirs.

The law applicable to cases of this kind is well settled. There must be full and satisfactory proof of the fact of a contract and of its terms before there can be specific performance. If the contract is sufficiently proved, and is definite in terms, and there has been performance by the plaintiff, and a peculiar and domestic relation has been assumed pursuant to which services incapable of pecuniary valuation have been rendered, specific performance will be decreed. The evidence is always to be examined attentively and weighed carefully. The object is to find the truth. The large burden of responsibility for a correct result is upon the trial court. The following cases illustrate the principles applicable: *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4; *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324; *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656; *Richardson v. Richardson*, 114 Minn. 12, 130 N. W. 4; *Haubrich v. Haubrich*, 118 Minn. 394, 136 N. W. 1025.

We are unable to hold, though we appreciate that the trial court has given the case painstaking care, that the evidence justifies a finding that the agreement related to less than all of the property which

the Brasches owned at the time of their death. A finding either way upon the question whether any agreement at all was made would have support. Under the evidence now before us the plaintiff should have none or all of the land. Since the findings cannot be sustained as showing an agreement as to a part of the land only, and all parties have appealed, a new trial of all the issues should be granted. Mutual concessions may make unnecessary a second trial of an uncertain and troublesome question of fact.

Judgment reversed on both appeals and new trial ordered.

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CASEY PURE MILK COMPANY v. BOOTH FISHERIES  
COMPANY and Another.<sup>1</sup>

December 19, 1913.

Nos. 18,396—(147).

**Conversion — pleading.**

In an action for conversion of personal property, an allegation in the alternative that one or the other of two defendants converted the goods, but, which one, plaintiff is unable to determine, states no cause of action against either defendant.

Action in the municipal court of St. Paul to recover \$180. From an order overruling separate demurrers of defendants, Hanft, J., they appealed. Reversed.

*Briggs, Thygeson & Everall*, for appellants.

*Thomas C. Daggett and John R. Foley*, for respondent.

HALLAM, J.

Plaintiff sues two defendants, alleging that an order for goods was received from defendant Produce Company; that on October 12, 1910, plaintiff took the goods to the building occupied by both defendants, and, although the goods were intended for the Produce

<sup>1</sup> Reported in 144 N. W. 450.

Company, they were delivered to defendant Fisheries Company; that the next day plaintiff notified the Fisheries Company to deliver the goods to the Produce Company and the Fisheries Company agreed to do so; that on the first of the following month plaintiff demanded payment of the Produce Company, that the Produce Company denied receiving the goods; that the Fisheries Company, on inquiry, stated that it had delivered the goods to the Produce Company. It is alleged that one or the other of defendants received the goods and converted them to its own use, but, which one, plaintiff is unable to determine by reason of the counterclaims of defendants. Defendants demur separately on the ground that the complaint states no cause of action.

We cannot sustain this complaint. We do not wish to detract from the very wholesome rule that pleadings should be liberally construed, but there are a few cardinal principles of pleading that must be observed. One of them is that a complaint must state, with ordinary directness, facts which constitute a cause of action against each defendant. If the facts are not within the knowledge of plaintiff or his attorney, they may be alleged upon information and belief. This complaint does not allege facts showing liability of either defendant. Both defendants might answer admitting every allegation of the complaint, and still the court could not order judgment on the pleadings against either defendant.

We are of the opinion that this form of pleading is not permissible under the code procedure, and such we believe to be the generally accepted rule. *Price v. Virginia-Carolina Chemical Co.* 136 Ga. 175, 71 S. E. 4; *Brown v. Illinois Cent. R. Co.* 100 Ky. 525, 38 S. W. 862; *Oglesby's Sureties v. State*, 73 Tex. 658, 11 S. W. 873; 30 Cyc. 131. A different practice prevails in some jurisdictions, but this is by virtue of express provisions of statute. *Honduras Inter-Oceanic Ry. Co. v. Lefevre & Tucker*, 36 L. T. (N.S.) 46; *Child v. Stenning*, 36 L. T. (N.S.) 426; *Bennetts & Co. v. McIlwraith & Co.* 75 L. T. (N.S.) 145; *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546; *Rules of Practice*, 58 Conn. 561, 20 Atl. v.

There is some authority for the proposition that an exception is made in cases where it is impossible to determine where liability rests, by reason of some close relation between defendants, or of some conduct on the part of defendants, and that in such cases both parties may be joined with an alternative allegation that the acts constituting liability were committed by one or the other. See *Braun & Ferguson Co. v. Paulson* (Tex. Civ. App.) 95 S. W. 617. Whether such circumstances give rise to an exception to the rule, we need not determine, for it does not appear that this is an exceptional case. The complaint contains no allegation of any close relation or community of action between these parties, except that they are tenants of the same building. It does not allege that they occupy the same business premises. The fact is, plaintiff made the mistake of delivering to one business house goods intended for another, and, instead of taking the trouble to make the transfer itself, relied upon the promise of the party to whom it made delivery to do so. The ultimate question in the case will doubtless be whether the Fisheries Company did transfer the goods to the Produce Company, as it promised to do. Similar questions are liable to arise in any case where one person is directed to deliver goods to another, to pay money to another, or to carry on almost any form of business negotiation with a third party. Similar situations may often be presented in negligence cases where one person is injured in the region of operation of two others.

Plaintiff's counsel states in his brief that he suggested to his adversaries that he amend his complaint so as to allege liability of both defendants. Had he asked this of the court on the hearing, his petition would doubtless have been granted. *Harp v. Bull*, 3 How. Pr. (N. Y.) 44; *Lord v. Hopkins*, 30 Cal. 77; 31 Cyc. 396. But he did not do this. He saw fit to stand upon the complaint as originally framed. However, the defects in plaintiff's complaint relate to matters of form. Demurrers and appeals on this ground are not encouraged, and no costs will be allowed to the appellant.

Order reversed.

S. B. WILSON v. JOE DANDERAND.<sup>1</sup>

December 19, 1913.

Nos. 18,413—(102).

**Sale — breach of warranty.**

1. In action upon promissory notes given in part payment of the purchase price of a full blood Percheron horse, in which defendant interposed the defense of a warranty and breach thereof, it is *held*: (1) That the reply admits the warranty substantially as alleged in the answer, and (2) that the evidence sustains the verdict to the effect that there was a breach of the warranty, in that the horse delivered to defendant was not a Percheron animal, and that defendant was damaged in consequence of the breach to the extent of the difference in value between the horse delivered and the one agreed to be delivered.

**Assignments of error.**

2. Other assignments of error *held* to present no reversible error.

Action in the district court for Lyon county to recover \$1,359.65 upon two promissory notes. The facts are stated in the opinion. The case was tried before Olsen, J., who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. From an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

*Barnes & Magoon, S. B. Wilson, Johnson & Lende, Wallace J. Black and Charles S. Cairnes, for appellant.*

*Tom Davis and Ernest A. Michel, for respondent.*

BROWN, C. J.

This action was brought to recover upon certain promissory notes made by defendant to Robert Burgess & Lukyn, a copartnership, and by them transferred to plaintiff. The notes represent a part of the purchase price of a horse sold by the firm named to defendant. Defendant interposed in defense that the horse so purchased was represented and warranted as an imported full-blood Percheron, and

<sup>1</sup> Reported in 144 N. W. 400.

entitled to registration as such in the books of the Percheron Society of America; that in making the purchase defendant relied upon the warranty; that the warranty was not true and that there was a breach thereof resulting in damage to defendant. The answer further alleged that the horse was not a full-blood Percheron; on the contrary, was what is known in the trade as French draft, the value of which according to some of the evidence was very much less than the Percheron. The reply admitted the warranty substantially as alleged by defendant, and plaintiff at the trial made no claim that he was a bona fide holder of the note, it being conceded that the defense interposed, if true, was available to defendant as against plaintiff. Defendant had a verdict and plaintiff appealed from an order denying his alternative motion for judgment or a new trial.

The principal question presented to this court is whether the evidence supports the verdict; though some of the assignments of error challenge the correctness of certain rulings of the court on the trial which will be referred to in their order.

1. There is no controversy in the pleadings or evidence upon the question of warranty; it stands admitted that Burgess & Lukyn warranted the horse sold to defendant as a French Percheron. The substantial controversy is whether there was a breach of that warranty. Defendant contended on the trial, and again in this court, that the evidence fully justifies the conclusion that a Percheron horse was not in fact delivered to him, but instead thereof a French draft animal. While plaintiff insists that the evidence is practically conclusive that the horse delivered to defendant was a Percheron, and that the contract of sale was thereby fully performed. Nor is there any dispute that at the time of the sale Burgess & Lukyn delivered to defendant a certificate of pedigree, printed in the French language, and which certified that the horse was a French draft animal named "Bysantin." This certificate defendant could not read. There was also delivered to defendant at the same time a certificate issued by the "American Percheron Horse Breeders Association," an organization located and doing business at Chicago, wherein it was certified that the particular horse had been registered in its books as a Percheron, and the animal was there given the name of Bysantin. This certif-



icate was printed in the English language, and plainly certified that the horse Bysantin was a registered Percheron, imported from France by Burgess & Lukyn in 1904. The bill of sale delivered with the horse also described the animal as an imported French Percheron named Bysantin. With these muniments of title and pedigree defendant closed the transaction.

A subsequent attempt to register some of the offspring of the horse with the Percheron Society of America failed for the reason, asserted by the officers of that society, that the animal was not a Percheron, but a French draft, and could not therefore be registered as a Percheron. This occurred some four years after the original bargain and sale. The situation was called to the attention of Burgess & Lukyn, and after subsequent investigation and inquiry they reported to defendant that there had been a mistake in the delivery of the pedigree papers in France, at the time the horse, with others, was purchased, and that in fact the horse Bysantin was not imported by them, but instead thereof a horse named "Aubepin," which was a full-blood Percheron, and that the horse Aubepin was the animal sold and delivered to defendant. The trial below, as respects this branch of the case, centered around this claim of mistake, and whether in fact the horse Aubepin, an unquestioned Percheron, was the one delivered to defendant. There can be no question, if the horse delivered to defendant was in fact a Percheron, whatever may have been his name, that the contract of warranty was performed, and defendant could in such case have no cause of complaint. But the question whether there was a mistake in the pedigree papers, as claimed by plaintiff, and whether a Percheron was in fact delivered to defendant, we conclude, after a somewhat careful consideration of the record, were issues of fact for the jury. And since the trial court has approved the verdict we discover from the record no sufficient reason for interference.

Burgess & Lukyn, in 1904, imported a number of horses from France, among them being the horse sold defendant. The lot contained both Percheron and French draft horses. Certificates of pedigree were delivered for each horse, and were brought with the animals to this country. The certificate for the horse Bysantin, printed

in French, described him as a French draft, yet upon the strength of that certificate Burgess & Lukyn procured his registration in the Chicago Breeders Association, above mentioned, as a Percheron, delivering the certificate thereof to defendant at the time of the sale. The explanation of this certificate is found, as we understand the record, in the fact that both breeds of horses were eligible to registration indiscriminately in that society. But this does not explain why the Chicago certificate should give a false pedigree, when the true pedigree, namely, French draft, was plainly stated in the French certificate. This was left on the trial without sufficient explanation.

A deposition of the French trader, one Beatrix, was taken and read in evidence on the trial. He testified to the alleged mistake in delivering the wrong pedigree certificate, and further that he knew nothing about the horse Bysantin, whose pedigree he delivered, but did know that he sold the horse Aubepin to Burgess & Lukyn in 1904. If he knew nothing about Bysantin, as he testified, it is a little difficult to understand why he should be possessed of and deliver to these purchasers a certificate of his pedigree, unless it was the result of a general uncertainty in the delivery of such certificates, for which no sufficient explanation could be given. Beatrix was an extensive dealer in blooded horses and though he might after a lapse of four years be able to name all horses sold to a particular purchaser, and recall the fact that he gave out a wrong certificate as to one of them, the jury, from the evidence presented, might well have concluded that his testimony was unreliable, and that his claim of mistake not sufficiently shown. Again the French certificate particularly described the horse, and there was a conflict in the evidence whether the horse defendant received corresponded to the description of the horse Aubepin, thus presenting an issue of fact. Other items of evidence might be referred to, but we deem it unnecessary. We have considered it all with the result above stated. The verity of the alleged claim of mistake, and that of the witnesses was for the trial court and jury, and we are unable to say, as strongly urged by counsel for plaintiff, that the evidence is conclusive that defendant in fact received a Percheron horse. The question was one of fact. The evidence tending

to show the difference in value between a Percheron and French draft horse was also conflicting and for the jury.

2. The other assignments do not require extended mention. We find no error in the exclusion or admission of evidence of a character to justify a new trial. There was no abuse of discretion in permitting defendant to reopen his case for the introduction of additional evidence. The question whether evidence of the warranty alleged in the answer was inadmissible because varying and adding to the terms of the bill of sale is without merit. The reply admitted the warranty substantially as alleged in the answer. *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1, is not therefore in point. The answer, though containing allegations of fraud and deceit, properly construed, presented a case of ordinary warranty and breach thereof, and the trial court was not in error in so submitting the case to the jury.

All assignments of error not specially mentioned have received consideration with the result that no reversible error appears.

Order affirmed.

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### STATE v. HENRY WEINGARTH.<sup>1</sup>

December 26, 1913.

Nos. 18,093—(41).

#### **Sale of intoxicating liquor.**

In a prosecution for the sale of intoxicating liquors without a license contrary to a city ordinance it is *held* that the evidence does not support a judgment of conviction.

From a judgment of the municipal court of St. Paul, Finehout, J., finding defendant guilty of the offense of selling intoxicating liquor without a license, he appealed. Reversed.

*Schmidt & Waters*, for appellant.

<sup>1</sup> Reported in 144 N. W. 745.

*Lyndon A. Smith*, Attorney General, *O. H. O'Neill*, *John A. Burns* and *Thomas W. McMeekin*, for respondent.

DIBELL, C.

The defendant appeals from a judgment of the municipal court of St. Paul finding him guilty of selling intoxicating liquor without a license, contrary to an ordinance of the city, and sentencing him to the workhouse for 30 days.

The defendant was accused of selling the liquor to two named persons on February 1, 1913. The sale was made by his wife. On that day she was arrested. She pleaded guilty. On February 18, 1913, complaint was made against the defendant for the same sale and he was tried with the result stated.

The place at which the sale was made was a hotel. The hotel license was in the name of the defendant's wife and had been for four years. She leased the property and paid the rent. She and her husband claimed that she ran the place. There was no competent evidence that the defendant ran it. There is no claim that there was any sale except the one made by the defendant's wife. It is not claimed that the defendant took part in the sale. The evidence is in dispute whether he was in the room when the sale was made. If he was, it is only by inference that it can be found that he knew of it. We do not mean to be understood as saying that two persons may not be convicted for a single sale or that one may not be convicted for a sale made by another under his authority. The defendant had been convicted of selling liquor at the same place at times previous. The evidence suggests a strong suspicion that likely the defendant and his wife were running a blind pig; but upon a thorough review we are compelled to hold that the legal evidence produced does not support the judgment of conviction.

Judgment reversed.

STATE *ex rel.* CITY OF VIRGINIA *v.* COUNTY BOARD OF  
ST. LOUIS COUNTY and Others.<sup>1</sup>

December 26, 1913.

Nos. 18,227, 18,237—(20, 21).

**Classification of cities by population.**

1. Section 36, article 4, of the Constitution of Minnesota, permits the classification of cities for legislative purposes into four classes, on a basis of population. The legislature, by R. L. 1905, § 746, divided the cities of the state for legislative purposes into four classes, as permitted by the Constitution. It is within the constitutional power of the legislature to provide that, for the purpose of classification of cities, population shall be determined according to the state census alone.

**Same — power of legislature.**

2. The constitutional right of the legislature to pass a law fixing a test by which population is to be determined, carries with it the right to change the test, and this right is not taken away or suspended by the fact that its exercise may result in shifting some city from one class into another.

**Same.**

3. The legislature has no power to adopt a means of determining population which is arbitrary and designed merely as an evasion of the Constitution; but we cannot say that the statute adopted in this case, making the state census alone the test of population, whereas under the previous law resort was had to the latest census, state or Federal, was wholly arbitrary, evasive or without reason.

Upon the relation of the city of Virginia the district court for St. Louis county issued its alternative writ of mandamus, directing the members of the county board of St. Louis county to order an election as provided by Laws 1909, c. 137, for the determination of the annexation to the city of Virginia of certain territory described in a certain petition for annexation on file in the office of the county auditor. The respondents appeared individually and as the county board and moved to quash the writ, for the reason that neither the petition nor

<sup>1</sup> Reported in 144 N. W. 756.

the writ stated facts showing that relator was entitled to a writ of mandamus. The Hobart Iron Co. filed its complaint in intervention and the Oliver Iron Mining Co. and other companies filed their complaint in intervention. From an order, Dibell, J., denying relator's motion to quash the writ, defendants and the interveners appealed. Reversed.

*Charles E. Adams*, for defendants.

*Washburn, Bailey & Mitchell, Frank B. Adams and George W. Morgan*, for interveners.

*Daniel D. Morgan and Fryberger, Fulton & Spear*, for petitioners.

HALLAM, J.

Certain residents of the city of Virginia and of territory adjacent thereto, acting under the provisions of chapter 137, p. 148, Laws 1909 (G. S. 1913, §§ 1651-1663), petitioned the county board of St. Louis county to call an election to vote upon the question of annexation of such adjacent territory to the city. As to the subsequent proceedings, it is only necessary to say that the county board denied the petition, on the ground that the act of 1909, on which it was based, applies only to cities of the third class, that is, cities having a population of from 10,000 to 20,000, and that Virginia is not in that class, but in the fourth class, which is composed of cities having a population of not more than 10,000. The city commenced this proceeding in mandamus to compel the county board to grant the petition. The county board, and certain taxpayers who had intervened, moved to quash the writ. The court denied the motion, and defendant board and the interveners appeal.

The question whether Virginia was in the third or fourth class is the only question in the case that we find it necessary to consider.

The facts are, that, by the state census of 1905, the population of Virginia was 6,056; by the Federal census of 1910 it was 10,473. The question is: By what test is population for purposes of this classification to be determined? If the state census governs, then Virginia is in the fourth class, and the county board was right. If the Federal census is taken into account, then it is in the third class.

1. The classification of cities on a basis of population is authorized by section 36, art. 4 of the Constitution, which provides:

"The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less, which shall apply equally to all such cities of either class."

The Constitution does not provide the test for determining the number of "inhabitants" of a city. Pursuant to this constitutional provision, the legislature passed R. L. 1905, § 746 (G. S. 1913, § 1339) which provides:

"Cities are hereby divided, for legislative purposes, into classes as follows: First class. Those having more than fifty thousand inhabitants. Second class. Those having twenty thousand, and not more than fifty thousand, inhabitants. Third class. Those having more than ten thousand, and not more than twenty thousand, inhabitants. Fourth class. Those having not more than ten thousand inhabitants."

Then comes chapter 73, p. 89, Laws 1911 (G. S. 1913, § 1340) which provides:

"That for the purpose of determining the classification of the several cities of this state, the population of every such city shall be ascertained and determined according to the last census taken under and pursuant to the laws and authority of the state of Minnesota, and every such state census shall govern and determine the population of each such city in this state for the purpose of determining to which class such city belongs."

These constitutional and statutory provisions form a complete system, and result in placing Virginia in the fourth class. There would be no question about it were it not for the fact that a former law, R. L. 1905, § 5514, subd. 12, contained the provision that "the word 'population' and the word 'inhabitants,' when used in reference to population, shall mean that shown by the last preceding census, state or United States, unless otherwise expressly provided." Un-

der this provision Virginia had entered the third class before chapter 73, p. 89, Laws 1911, was passed.

Respondent city does not claim any vested right to remain in the third class, but it contends that the act of 1911 is unconstitutional and void; that the act violates three clauses of the constitutional provision above quoted:—The clause providing for general laws, the clause providing that laws shall apply equally to all such cities of either class, and the clause that the legislature shall provide laws applying to these four classes thus fixed by the number of inhabitants. It contends that this act of 1911 was arbitrary, that it was passed for the purpose of evading and circumventing the constitutional prohibition of special legislation, and for the arbitrary purpose of retaining in the second class the city of Winona, whose population, as shown by the Federal census, had dropped from 20,334 to 18,583.

On these grounds we are asked to set aside, as unconstitutional and void, chapter 73, p. 89, Laws 1911. We are of the opinion that the act of 1911 must stand. The setting aside of an act of the legislature is no light matter. All argument based on the unwisdom of the legislation is apart from the issue. We cannot set aside laws because we may think them unwise. Their wisdom is for the legislature to determine. Nor can we set aside an act because it was induced by improper motives. This court cannot sit in review in such matters. The question presented to us for review is not one of legislative wisdom, but solely one of legislative power. We are of the opinion that the passage of this statute was within the legislative power. Every possible presumption is in favor of the validity of the statute. "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." *Washington, J., in Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 270, 6 L. ed. 606.

Years ago this state, by constitutional amendment, prohibited special legislation. Section 33, art. 4, Constitution of Minnesota. But the constitutional prohibition of special legislation did not deprive legislatures of power to classify districts of the state for pur-



poses of legislation, if the basis of the classification is germane to the purpose of the law. It was early held that population may be a basis of classification, if germane to the purpose of the law. It often proved difficult to determine whether or not population was germane to the purpose of the law, and section 36, art. 4, of the Constitution of Minnesota was adopted to enable the legislature to make population a basis of classification, although there might not be any natural relation between the subject-matter of the proposed law and the number of people in the classified cities, and although previous to the amendment such basis would have been held not germane to the purpose of the proposed law. *Alexander v. City of Duluth*, 77 Minn. 445, 80 N. W. 623.

In applying section 36, art. 4, of the Constitution, there must be some rule or method by which, or a tribunal in which, the fact of population is to be ascertained and determined. The Constitution is silent on the subject. It is within the power of the legislature to prescribe some reasonable test. No method or test can be exact. It is settled in this state that a statute classifying cities on a basis of population at the time of the last preceding state census establishes a proper test, is not a special law, and is valid. *State v. District Court of Ramsey County*, 84 Minn. 377, 87 N. W. 942.

2. The fact that under the law in operation before chapter 73, p. 89, Laws 1911, was enacted, Virginia had already passed into the third class, and that this act operated to place it in the fourth class, does not render the act unconstitutional, so long as the act is general in its nature and applies equally to all cities that are in like situation. The power to fix a test by which population is to be determined, carries with it the power to change the test. It will not do for this court to say that the method of determining population existing before the act of 1911 was passed, was the only just one. That was for the legislature to determine. The legislature has now determined that in its judgment resort to both Federal and state census is not the proper test to apply to this class of cases. It will not do to hold that the constitutional power of the legislature to change the basis or test of determining population, is limited to changes that will be effective upon the taking of a future census. Any such rule

might bind the legislature to a basis or test that had proven manifestly unjust. The constitutional power of the legislature to pass a law fixing a test by which population is to be determined, is not taken away or suspended by the fact that its exercise may result in immediately shifting some city from one class into another. The Constitution does not make these classes. It simply permits the legislature to make them. After the legislature has made classes within the constitutional limitations, it may wipe them out again if it sees fit. The fact that a city is within a certain class, simply makes a certain set of general laws applicable to it. A city has no constitutional or vested right to any particular set of regulatory laws. The legislature can change or repeal them. It may do so either by acting directly upon the laws themselves or by changing the test of classification by the adoption of any other test which it might have adopted in the first instance.

3. It is true the legislature cannot use a means of determining population which is arbitrary and designed as a mere evasion of the Constitution. *Nichols v. Walter*, 37 Minn. 264, 271, 33 N. W. 800. But we cannot say that this legislation was wholly arbitrary, evasive and without reason. There are some arguments in favor of the adoption of the single standard for determination of population. In certain communities where population changes but little there is likelihood that, owing to the different methods pursued in the taking of state and Federal census, a city might shift back and forth from one class to the other without real change in population in point of fact. The legislature, in adopting the state census as the sole test, adopted a method which this court had already said was a test within their power to adopt. *State v. District Court of Ramsey County*, *supra*. We hold that in adopting this test, and making it applicable at once, the legislature was within its constitutional powers.

It is worthy of note that this same city of Virginia very recently contended before this court for the validity of the very statute which it now attacks. *Backus v. City of Virginia*, 123 Minn. 48, 142 N. W. 1042. This of course concluded no one as to the proper construction of general statutes of the state, but it is significant in view

of the fact that the validity of this statute, passed nearly three years ago, has not been elsewhere challenged.

Order reversed.

HOLT, J. (dissenting).

I dissent. I see nothing unconstitutional in the act, but am of the opinion that it should be construed to apply only to a state census in the future. Classification is based on a count of the inhabitants. The cities of this state increase in population; a decrease is the exception. When a city has come into a class under a provision of law based on a count of its inhabitants, it ought not be placed in a different class by a mere rule of evidence adopting some previous count or census which every one knows does not approximate the true population. By the last Federal census Mankato, St. Cloud and Virginia came into the same class. Their executive and legislative officers from January 1, 1911, until the passage of the act, March 30, 1911, had to adapt themselves to the laws governing cities of the third class. By this decision, Mankato, the smallest of the three, retains her class, while St. Cloud and Virginia drop back into the fourth class. It seems to me a construction which brings about such a result is not reasonable.

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**SHEVLIN-CARPENTER LUMBER COMPANY v. ZENA  
J. TAYLOR.<sup>1</sup>**

December 26, 1913.

Nos. 18,272—(152).

**Mechanic's Lien — evidence.**

1. The findings of the trial court in an action to foreclose a mechanic's lien to the effect that a delay in the delivery of certain items of material,

<sup>1</sup> Reported in 144 N. W. 472.

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Note.—On the question whether a contractor is a necessary party to a bill to enforce a mechanics' lien, see note in 33 L.R.A. (N.S.) 69.

delivered some time after the substantial completion of the contract, was not for the wrongful purpose of extending the time within which to perfect the lien, are sustained by the evidence.

**Action to foreclose — estate of decedent concluded by decision.**

2. In an action by a lien claimant to foreclose his lien, perfected for material supplied the contractor, the personal representative of the contractor, who died before the commencement of the action, is a proper if not necessary party to the action, and the determination in that action of the amount due the lien claimant, an incidental issue, is conclusive upon the estate of the deceased contractor.

Action in the district court for Ramsey county to foreclose a mechanic's lien. The case was tried before Brill, J., who made findings that plaintiff was entitled to a lien of \$1,503.85 for materials, and \$100 for attorney's fees, and ordered that the premises described be sold for the purpose of paying the lien. From an order denying her motion for a new trial, defendant Taylor appealed. Affirmed.

*Morton Barrows and Arthur A. Stewart*, for appellant.

*B. H. Schriber*, for respondent.

BROWN, C. J.

Action to foreclose a mechanic's lien in which plaintiff had judgment and defendant appealed from an order denying a new trial.

The facts are not in dispute and are as follows: Defendant Taylor, the owner of the property, entered into a contract with one Ledy, a builder, for the construction of a dwelling house thereon, the contractor to furnish all material and labor used in and necessary to the completion of the building. The contract provided that the building should be completed on or before August 1, 1912. It was substantially completed and Taylor moved into the house on August 17. The contractor purchased all lumber and mill work for the building from plaintiff, the value of which exceeded the sum of \$1,500, and the most thereof was delivered upon the premises prior to August 17; two lights of glass were delivered on August 21, one screen door on September 19, and three storm doors and a screen on October 31. These items were all included in the original contract between the contractor and plaintiff. The contractor died on December 10, 1912,

and on December 11 plaintiff duly perfected a lien upon the property for the amount due for material furnished. The lien statement was not filed within 90 days from August 17, the time when the work was practically completed and defendant took possession, but was filed within 90 days from September 19 and October 31, upon which dates certain material, called for by the contract, was delivered upon the premises for use in final completion of the building.

Defendant interposed in defense that the lien was not perfected within the time prescribed by law, and was therefore of no validity. In support of this defendant alleged in his answer that the items of material delivered on September 19 and October 31 were wrongfully, unreasonably, and without excuse withheld and not delivered until the dates stated, for the purpose of attempting to extend and lengthen the time within which the lien could be filed and recorded. The trial court found that these allegations were not true, and after finding other necessary facts ordered judgment for plaintiff. It further appears that plaintiff did not, before the commencement of the action, or at all, file its claim with the probate court against the estate of the deceased contractor.

1. The findings of the trial court to the effect that the delay in delivering the items of material referred to was not for the purpose of unreasonably extending the time within which a lien might be perfected are sustained by the evidence, at least the evidence did not require a finding to the contrary. The case in this respect is not unlike *Anderson v Donahue*, 116 Minn. 380, 113 N. W. 975, where a similar issue was presented and the findings of the court were sustained.

2. Defendant further contends that it was essential to the right to foreclose the lien that the amount of plaintiff's claim be first determined by the probate court, the contractor being dead. No claim has been filed with that court. It was held in *Northwestern C. & C. P. Co. v. Norwegian D. E. L. A. S.* 43 Minn. 449, 45 N. W. 868, that a final determination, as between the lien claimant and the contractor of the amount due the claimant, is essential to the right of foreclosure, and that for this purpose the contractor is a necessary party to

the foreclosure action; the theory of the decision being that an adjudication upon that subject between the owner of the property and the lien claimant would not be binding upon the contractor unless a party to the action, and in a given case the owner might be compelled to pay more on the lien than he would be entitled to enforce over against the contractor. While that decision was rendered under a former mechanic's lien statute, no reason occurs to us why the general rule there laid down should not be applicable under our present statute, yet we do not deem it necessary to determine the question in the present action. The sole purpose of the rule is the protection of the owner of the property, and to guard against a possible excessive claim by some subcontractor or materialman. We think that protection is given in this case. And though, as urged by counsel for defendant, an administrator cannot be sued to recover upon a claim against the estate he represents until the same has been presented to and passed upon by the probate court, he was in fact made a party to this action and thus afforded an opportunity to protect the estate, and is bound by the judgment rendered against him. It is true that no personal judgment could be rendered against him; none was asked for; yet the action to foreclose was rightfully brought, the statutes require that it be commenced within a year, and in such case the amount claimed as a lien may be litigated without infringing the jurisdiction and authority of the probate court. The district court had full and complete jurisdiction to hear and determine every question essential to the right of plaintiff to a judgment, and it was not bound to await the action of some other tribunal having or possessing jurisdiction of some question incidentally involved. We therefore hold that the determination in this action of the amount due plaintiff is conclusive against the estate of the contractor.

Order affirmed.

GEORGE H. GARD v. COUNTY OF OTTER TAIL.<sup>1</sup>

December 26, 1913.

Nos. 18,273—(166).

**Title of act.**

1. The title to chapter 250, Laws 1911, *held* to sufficiently comply with the constitutional requirement that no law shall embrace more than one subject which shall be expressed in its title.

**Special law not amended.**

2. Section 4 of the act, providing for compensation of clerks of the district court of certain counties for the duties thereby imposed, *held* not to extend or amend chapter 423, Sp. Laws 1891, fixing the compensation of the clerk of the district court of Otter Tail county.

**Classification of counties reasonable.**

3. Section 5 of the act excludes from the operation of section 4 all counties having a population of 100,000. It is *held* that the classification is not arbitrary or unreasonable, on the contrary has reasonable basis for its support, and therefore not a violation of the provisions of the Constitution prohibiting special legislation.

Action in the district court for Otter Tail county to recover \$2,-437.10 for services rendered by the clerk of the district court of that county. From an order, Roeser, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

*Anton Thompson*, for appellant.

*N. F. Field*, for respondent.

BROWN, C. J.

This action was brought to recover fees alleged to be due plaintiff as clerk of the district court of Otter Tail county for services rendered under the provisions of section 4, of chapter 250, p. 348, Laws 1911. A general demurrer to the complaint was overruled, and defendant appealed.

<sup>1</sup> Reported in 144 N. W. 748.

The sole question presented is the validity of the statute referred to, it being admitted by the demurrer that the services for which recovery is sought were rendered as alleged in the complaint, the compensation whereof is fixed by the statute.

Defendant contends that the statute is unconstitutional and void for the reasons: (1) That it is an attempt by the legislature to enlarge and extend a special law by general enactment, in violation of the last clause of section 33, art. 4, of the Constitution; (2) that the title of the act is not in conformity with section 27, art. 4, of the Constitution, wherein it is provided that no law shall embrace more than one subject which shall be expressed in its title; and (3) that it violates sections 33 and 34 of article 4, in that it is special and not general in its application. We are unable to sustain either of these contentions.

1. The statute was intended to provide for the collection of vital statistics, and for the making and preservation of a permanent record of the same. It provides that such record be prepared by the state board of health, and also by the clerk of the district court. Section 4 imposes upon the clerk of the district court of each county the duty of indexing "all the records of births and deaths now in their offices and which have not been indexed," and for such service that the county shall pay the sum of five cents for each name so indexed. The title of the act is

"An act regulating the collection, indexing, preservation and use as evidence, of vital statistics."

The point made is that the duties imposed upon the clerk of the district court, and the compensation provided for, found in section 4, are not embraced within nor expressed by the title and, therefore, that this section of the statute must fall. We have no difficulty in sustaining the sufficiency of this title. It is comprehensive, and the several sections of the act are in complete harmony with the information thus conveyed. The provisions of section 4 are in no proper sense foreign to the general scope of the statute, on the contrary are entirely pertinent to the general subject-matter of the act. The title expresses the subject of the statute as one providing for the "collection, indexing and preservation" of vital statistics, and section



4 deals with the subject of indexing such statistics. It is clearly sufficient. 3 Dunnell, Minn. Dig. § 8906.

2. The second contention is that the statute, in so far as it may apply to Otter Tail county, is in effect an enlargement and extension of a special law, and therefore invalid under the last clause of section 33 of article 4 of the Constitution, wherein it is provided that "the legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same." This point is founded on the fact that by chapter 423, Sp. Laws 1891, the compensation of the clerk of the district court of Otter Tail county is fixed at the sum of \$1,500 per year, and the contention is that the statute in question enlarges that compensation by providing for a fee of five cents for each name indexed by him as required by section 4, hence that it is a modification of the prior special law. The contention is not sustained. The statute imposes upon the clerk an additional duty, one temporary in its nature, namely, the indexing of vital statistics not theretofore indexed, for which the compensation is provided. In other words, it was the purpose of the legislature to provide a complete record of births and deaths, and that for the purpose of bringing the same up to date the clerk performing that duty should be paid. After the completion of this particular work, for the service of keeping the records from time to time, the clerk, reads the statute, shall receive no "other compensation than the clerk's salary, or such fees as is herein provided in counties where the clerk is not on a salary basis." We think, and so hold, that it was within the authority of the legislature to provide for this additional compensation for the extra labor imposed upon the clerk and that it cannot be held that the special salary act relating to Otter Tail county was thereby modified or extended. That act remains undisturbed, the compensation provided being for the additional temporary work imposed upon the officer. The situation might be different, had provision been made for the continuation of the indexing fee. But it does not continue, on the contrary ceases when the index is brought up to date by including therein names not theretofore recorded.

3. Section 5 of the act provides that section 4 shall not apply to counties having a population of over 100,000. It is contended that

this is an improper classification, and a violation of the constitutional prohibition against special legislation. The effect of this provision was to exclude from the operation of section 4, the section under which plaintiff claims compensation, the counties of Hennepin, Ramsey and St. Louis, and the question presented is whether the exclusion of those counties was proper under the legislative power of classification for the purposes of general legislation. There can be no doubt of the right of the legislature to classify counties for this purpose, when there exists some substantial reason or basis therefor, having in mind the subject-matter of particular enactments. *State v. Sullivan*, 72 Minn. 126, 75 N. W. 8; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 59 L.R.A. 297, 89 Am. St. 571; 4 Notes on Minn. Reports, 881. If the classification is merely arbitrary, without reasonable basis for its support, the statute must, of course, fall. And in this case if it were clear that the legislature intended that the index records provided for by section 4 should be made only in the counties outside of those mentioned, the legislation would not meet the requirements of the Constitution. But there can be no doubt that the legislature in making this exception did not so intend. On the contrary, it is clear that the exception was made because of the fact that other methods and compensation were expressly provided for by prior statutes made applicable solely to the large and populous counties named, and they were evidently excluded from the operation of section 4, to the end that the provisions of other statutes for the collection and preservation of vital statistics, and the compensation therefor might not be disturbed, or confusion thrown about the important subject by conflicting provisions of the law upon the same subject. In this view the classification was entirely proper. Section 2141, R. L. 1905, expressly provides that the clerk of the district court in counties having a city of over 100,000 population should receive no compensation for any of the duties imposed by the statute in connection with births and deaths within such city. That section was re-enacted in 1909, with some changes, but without modification of the provision just referred to. Chapter 23, p. 26, Laws 1909. And though the city of Duluth, St. Louis county, does not contain a population of over 100,000, the county does, and no doubt that county was included in the exception

for reasons similar to those justifying the exclusion of Ramsey and Hennepin counties. It is clear therefore that the classification was not an arbitrary one, and the rule laid down in *Murray v. Board of Co. Commrs. of Ramsey County*, 81 Minn. 359, 84 N. W. 103, 51 L.R.A. 828, 83 Am. St. 379, does not apply.

Order affirmed.

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WILLIAM KENNISON v. S. S. HAW.<sup>1</sup>

December 26, 1913.

Nos. 18,275—(158).

**Findings sustained by evidence.**

Evidence considered and *held* to sustain the findings of the trial court.

Action in the municipal court of Minneapolis to recover \$135 upon two promissory notes. The case was tried before C. L. Smith, J., who made findings and ordered judgment in favor of defendant for \$5.53. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*Jay W. Crane*, for appellant.

*H. F. Woodard*, for respondent.

**BROWN, C. J.**

Action to recover upon two promissory notes in which defendant interposed a counterclaim for the value of services rendered by him for plaintiff in the sale of land. The making of the notes was admitted, and the court found that defendant was entitled to recover under his counterclaim, the amount of which exceeded plaintiff's claim by \$5.53, for which judgment was ordered in defendant's favor. Plaintiff appealed from an order denying a new trial.

The only question presented by the assignments of error is whether the findings of the trial court are sustained by the evidence. Our ex-

<sup>1</sup> Reported in 144 N. W. 452.

amination of the record leads to the conclusion that the evidence is sufficient. It is conflicting. Defendant testified that in January, 1910, he entered into an arrangement with plaintiff for the sale of land then owned by plaintiff in the state of Florida, and that plaintiff then agreed to pay him a certain commission for sales made. He further testified that he procured purchasers, reported them to plaintiff, who completed the sales. Plaintiff expressly denied this agreement. He testified that he owned no land in Florida at the time stated, and did not agree with defendant to pay him a commission for the sale of any such land. He, however, admitted that in May, 1910, he acquired some land in that state for a corporation, of which he and his son were in sole control as stockholders, and that some time after the formation of the corporation he arranged with defendant to sell some of the land. But he insisted that the transaction was made in behalf of the corporation. There is no dispute that defendant made certain sales, and that he was entitled to compensation therefor. The evidence stated presented a disputed question for the trial court. Defendant insisted that he was working for plaintiff, while plaintiff insisted he was working for the corporation.

Order affirmed.

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ALBERT NOVAK v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

December 26, 1913.

Nos. 18,287—(161).

**Failure to warn servant.**

1. In a personal injury action the evidence is *held* sufficient to support a finding of the jury that the defendant was negligent in failing to warn the

<sup>1</sup> Reported in 144 N. W. 751.

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Note.—The authorities on the general question of the master's duty to warn or instruct servant are collated in an extensive note in 44 L.R.A. 33. And as to the

plaintiff, an inexperienced employee, of the danger incident upon the use of a machine with which he was working and to instruct him as to an understood method of avoiding or lessening such danger.

**Negligence of fellow servant — request to charge.**

2. Conceding that a fellow servant of the plaintiff was negligent in his method of blocking the machine, and that his negligence had a casual connection with the injury, the case presented was one of the contributing or concurring negligence of a fellow servant, and a requested instruction by the defendant ignoring this was properly refused.

Action in the district court for Ramsey county to recover \$15,000 for personal injuries sustained while in defendant's employ. The answer alleged contributory negligence on the part of plaintiff and that he assumed all the risks. The case was tried before Dickson, J., who at the close of the case denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for \$650. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*M. L. Countryman and A. L. Janes*, for appellant.

*H. L. Dunn and Loomis, Keller & Schwartz*, for respondent.

**DIBELL, C.**

This is an action for personal injuries. There was a verdict for the plaintiff and the defendant appeals from the order denying its alternative motion.

1. The plaintiff was employed as a machinist's helper in the defendant's shops. He and the machinist were engaged in driving bolts in an engine undergoing repairs. A machine known as a bolt-driver was used. The machine, on the occasion of the plaintiff's injury, was placed horizontally between the bolt to be driven and an opposite surface, and blocking was used to make it secure. The bolts were driven by hydraulic pressure. The evidence is that a bolt-driver is liable to slip or fly from its place, and that its use is necessarily at-

master's duty to protect or warn servant against dangers not reasonably to be apprehended, see note in 21 L.R.A. (N.S.) 89.

On the question of negligence of fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business, see note in 4 L.R.A. (N.S.) 516.

tended with danger. The evidence is that there is an understood method whereby one, by assuming a particular position relative to the blocking, can avoid or lessen the danger. No warning or instruction was given to the plaintiff. He was unfamiliar with the work. The court rightly left it to the jury to find whether the situation was such that it was negligence in the defendant not to warn the plaintiff of the danger of the work or to instruct him how to avoid its dangers. An employer may be liable for a failure to warn or instruct though his machinery is in proper condition and is properly operated. The case involves the application of a principle illustrated by many cases. 2 Dunnell, Minn. Dig. §§ 5929-5942. The evidence justified a finding of negligence.

2. At the close of the trial the defendant moved for a directed verdict. The motion was denied. The court at the time stated that it thought that there was no question, except the one just mentioned, to be submitted to the jury; and that the case would be submitted upon that question. The defendant at the time made no suggestion as to the negligence of the machinist who, it is conceded, was a fellow servant. In the complaint the negligence of the machinist in putting in the blocking was alleged and some evidence in proof of it was offered. At the close of the charge the defendant called attention to the alleged negligence of the machinist in blocking the bolt-driver and suggested, in substance, that if he was negligent and there was a causal connection there could be no recovery by the plaintiff. Conceding that there was evidence of the negligence of the machinist, and of its causal connection with the plaintiff's injury, sufficient to go to the jury, nothing was presented to the court requiring it to charge relative thereto. If the machinist was negligent the case was one to be submitted to the jury upon the question of the negligence of the defendant and the contributing or concurring negligence of a fellow-servant within the familiar rule stated in *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949, and cases cited. No other submission would have been proper, and such a submission was not asked.

We think it unnecessary to discuss the claim that the damages are excessive.

Order affirmed.

## MONTHLY INSTALMENT LOAN COMPANY v. SKELLET COMPANY.<sup>1</sup>

December 26, 1913.

Nos. 18,291—(146).

### **Lien on personal property — chattel mortgage.**

1. By Laws 1905, c. 328, amended by Laws 1907, c. 114, (G. S. 1913, §§ 7036, 7037,) giving a lien on personal property transported and stored at the request of the owner or legal possessor thereof, it was intended that one transporting and storing property at the request of a chattel mortgagor in legal possession should have a lien superior to the interest of the chattel mortgagee.

### **Act constitutional.**

2. The statute so construed is constitutional.

Action in the municipal court of Minneapolis for the immediate restitution of certain chattels or for \$58, the value thereof. The answer set up a lien of defendant as warehouseman, under R. L. 1905, §§ 3521, 3522, for the sum of \$39. The case was tried upon stipulated facts before Montgomery, J., who made findings that defendant was entitled to retain possession of the property under its claim of a possessory lien thereon for its just and reasonable charges for the transporting, storage and care of the property. From an order denying plaintiff's motion for a new trial, it appealed. Affirmed.

*Farnam & Tappan*, for appellant.

*A. B. Darelius*, for respondent.

DIBELL, C.

This is an action of replevin by the plaintiff, a chattel mortgagee, to recover possession of the mortgaged property from the defendant who had transported it and stored it at the request of the mortgagor in legal possession, and who claimed a lien for transportation and

<sup>1</sup> Reported in 144 N. W. 750.

storage charges. There were findings for the defendant and the plaintiff appeals from the order denying his motion for a new trial.

The chattel mortgage covered certain household furniture located in Minneapolis. It was made in August, 1910, and forthwith filed so as to give constructive notice. In September, 1910, the mortgagor was in default. In September, 1911, the mortgagor, who was in legal possession, employed the defendant to transport and store the mortgaged property. The defendant claims a lien for transportation and storage charges superior to the interest of the plaintiff mortgagee.

By Laws 1905, p. 515, c. 328, amended by Laws 1907, p. 123, c. 114 (G. S. 1913, §§ 7036, 7037), a lien is given to any one who "at the request of the owner or legal possessor of any personal property" transports it from one place to another or stores it as a ware-houseman or bailee.

The questions are whether the lien given is intended to be superior to the interest of the mortgagee; and, if the statute is construed to intend a superior lien, whether it is constitutional.

1. In *Smith v. Stevens*, 36 Minn. 303, 31 N. W. 55, it was held, construing a statute of like import from which the statute under consideration comes, that a liveryman, who kept horses at the request of the mortgagor, legally in possession of them, had a lien which took precedence of a chattel mortgage. This is not the rule under the various common-law liens; nor is it the prevailing rule under statutes giving liens for the care or keeping or preservation or improvement of personal property. It finds some support among the cases. *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425; *Corning v. Ashley*, 51 Hun, 483, 4 N. Y. Supp. 255; *Willard v. Whinfield*, 2 Kan. App. 53, 43 Pac. 314. In the construction of the statute importance is rightly attached to the use of the words, "at the request of the owner or legal possessor," as intending that the legal possessor may charge the property with a lien for specified purposes against the true owner. While a different construction might have been given the statute we see no sufficient reason to change the one adopted in *Smith v. Stevens*, *supra*, and we adhere to it. It is suggested that a distinction should be drawn between this case and that because there a liveryman's lien for the care of horses was involved and here the property



is inanimate. If the question were whether the mortgagee assented to the creation of a lien the distinction might be important. The statute refers to animate and inanimate property in the same terms and cannot be held to mean one and not the other.

2. We cannot adopt the argument that if the statute intends to give the bailee a superior lien it is unconstitutional as impairing the mortgage contract or depriving the mortgagee of his property. In *Smith v. Stevens*, *supra*, the court, in commenting upon the question of constitutionality, said that the mortgagee took his mortgage, "in legal contemplation, with full knowledge of and subject to the right of a person keeping the property at the request of the mortgagor or other lawful possessor to the statutory lien, as he would to a common-law lien." This statement is questioned because of the language used in *Meyer v. Berlandi*, 39 Minn. 498, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. 663, referring to *Smith v. Stevens*, *supra*, as follows:

"But no case ever held that a mortgagor could, without the authority of the mortgagee, expressed or implied, create a lien on the mortgaged property so as to give it precedence of the mortgage. The law, whether common or statute, giving a lien, could not give it precedence of a prior incumbrance without authority from the mortgagee back of it."

If by this it is meant that a chattel mortgagee when he takes his mortgage does not contract with reference to an existing statute which gives to one caring for, keeping or preserving the mortgaged property a lien for his services, we do not agree with it. The mortgagor does not by contract with the bailee create a lien superior to the interest of the mortgagee. The statute gives the right to lien, and the chattel mortgagee, by his mortgage contract, consents that under stated conditions his interest shall be subject to a lien, or, in other words, contracts with reference to the statute. Our statute, R. L. 1905, § 3546 (G. S. 1913, § 7082), gives a threshing lien in terms superior to all liens and incumbrances except the lien for seed grain. In *Phelan v. Terry*, 101 Minn. 454, 112 N. W. 872, where the constitutional objection was made that is made here, the court said:

"The statute in no proper view violates either of the constitutional

provisions referred to. It is upon the statute books, a part of the law of the state, and all persons dealing with the owners of crops which may be subject to the lien thereby created are charged with notice of its provisions and of the rights that may arise thereunder. If a creditor should cause execution to be levied upon the crops of his debtor, or a chattel mortgage be taken thereon, all rights thus acquired would be subject necessarily to the superior rights granted to the thresher, who by his services puts the crop in a marketable condition."

The case of McMahan v. Lundin, 57 Minn. 84, 58 N. W. 827, involving the priority of a seed-grain lien over a prior chattel mortgage, is upon the same principle. Other illustrations might be given.

Plaintiff cites a number of cases in support of the claim that such a statute is unconstitutional. National Bank of Commerce v. Jones, 18 Okla. 555, 91 Pac. 991, 12 L.R.A.(N.S.) 310, 11 Ann. Cas. 1041; Crowther v. Fidelity Insurance Co. 29 C. C. A. 1, 85 Fed. 41; Yateman v. King, 2 N. D. 421, 51 N. W. 721, 33 Am. St. 797. Upon examination it is found that these cases refer to statutes enacted after rights had vested under the chattel mortgage. They have no application. We think the statute constitutional.

Order affirmed.

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## QUAKER CREAMERY COMPANY v. J. A. CARLSON.<sup>1</sup>

December 26, 1913.

Nos. 18,313—(180).

Objection to jurisdiction waived.

1. Where defendant filed an answer after discontinuance of a justice court

<sup>1</sup> Reported in 144 N. W. 449.

action caused by adjournment, on plaintiff's motion on the return day, for more than one week (G. S. 1913, § 7522), he thereby waived objection to jurisdiction, though the answer was a nullity, so far as regards admission of proofs thereunder, because not filed within the time allowed by law; and on the adjourned day the justice properly denied defendant's motion to dismiss for lack of jurisdiction.

**Appeal and error — exception.**

2. Nor was it error to reject proofs under the answer; an exception, furthermore, being necessary to save this point for review.

Plaintiff appealed to the district court for Sibley county upon questions of law alone, from a judgment of \$39.75, and costs, entered in justice court. The appeal was heard by Morrison, J., who ordered that the judgment be reversed. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

*Young & Quandt*, for appellant.

*George A. & C. H. MacKenzie*, for respondent.

PHILIP E. BROWN, J.

Plaintiff recovered judgment in justice court, which was reversed on defendant's appeal on questions of law alone, and plaintiff appealed from the judgment of the district court.

On March 4, 1913, the return day of the summons, the parties appeared and plaintiff filed complaint; whereupon defendant, without answering, demanded an adjournment for one week. Plaintiff moved for adjournment until March 13, and the court, over defendant's objection, granted the latter motion. The justice's return contained the following:

"On March 10th, 1913, a paper or document purporting or pretending to be an answer on the part of the defendant to the complaint in said action was received and placed with the summons, complaint

and other files in the action, and the same was acknowledged by a formal receipt to defendant's counsel in the following form:

"State of Minnesota, } "County of Sibley. }	In Justice Court, Before C. C. Eaton, Justice.
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"THE QUAKER CREAMERY COMPANY, a Corporation,  
"Plaintiff,

vs.

"J. A. CARLSON,

"Defendant.

"The answer of the defendant received and filed in said action this 10th day of March, 1913.

"C. C. Eaton, Justice of the Peace.

"But that no entry thereof was made in the docket at the time or any other time prior to the adjourned day; and not then because the court became advised and believes and still does believe that such pretended answer was improperly so received and placed and that it was beyond the jurisdiction of the court to receive and file the same on said March 10th, 1913."

On March 13 both parties appeared, and defendant moved for dismissal on the ground that the cause had been adjourned for over one week without his consent, and also because such was granted on plaintiff's motion without verified application. The motion was denied; whereupon plaintiff submitted its proofs and rested. Defendant then attempted to prove the allegations of his answer, but was not allowed to do so, the court sustaining plaintiff's objection, based on the ground that the filing of the answer on March 10 was improper and there was no answer in the case. Judgment was then entered for plaintiff.

If discontinuance resulted from the adjournment of more than one week on the return day (G. S. 1913, § 7522), such occurred when the order was made. Defendant, however, could, and did, waive this, and

recognized jurisdiction by filing his answer. As stated in *Johnson v. Hagberg*, 48 Minn. 221, 50 N. W. 1037, it is a rule of universal application that a party may, by consent, give jurisdiction over his person, and it follows as a consequence that, where there is any defect of jurisdiction, or it has ceased, he may waive the objection, and does so when he takes or consents to any step in the cause which assumes that jurisdiction exists or continues. Defendant's attempt to file an answer accords with retention of jurisdiction, and can be referred to no other theory. It was as unequivocal an assumption of continuation of jurisdiction as would be the filing of a written waiver. Hence the justice was right in refusing to grant defendant's motion to dismiss made March 13.

Was the answer effective for any other purpose? We cannot hold it was. This question is apart from both that of jurisdiction and of the right to file a pleading at a time not permitted by statute. An unverified answer in justice court is a nullity so far as regards admission of proofs thereunder against proper objection, but it would scarcely be claimed that if a defendant should cause one defective in this regard to be filed it would not constitute an appearance, and thus give the court jurisdiction where the summons had not been duly served, and this irrespective of the right to offer proofs under it. The same might also be said of an attempt to demur in justice court.

Where parties appear on the return day, and on plaintiff's application hearing is adjourned for one week, answer may be filed on the day to which hearing is adjourned. *Nohre v. Wright*, 98 Minn. 477, 108 N. W. 865, 8 Ann. Cas. 1071. The theory is that plaintiff's motion amounts to consent to the filing of the pleading on the adjourned day, and the action of the justice in granting adjournment appoints, by implication, the time, within the limitation of the statute cited, within which answer may be filed. But the difficulty here arises in spelling out any agreement in this regard. Defendant's first act on March 13 was to move to dismiss on the ground that the case had been adjourned for more than one week without his consent. Moreover, on the return day defendant's request was for adjournment for one week, and it was against his objection that the justice allowed nine days, thus taking the time for pleading beyond the statutory limit.

Without consent, an answer cannot be filed more than one week after return day. See cases cited to the statute. Neither can a pleading be filed so as to bind the opposite party without his consent at times not specified by statute. *Taylor v. Walther*, 97 Minn. 490, 107 N. W. 162. Furthermore, defendant took no exception to the court's ruling refusing to permit him to offer proofs. Such was necessary in order to save the point for review on his appeal. *Franek v. Vaughan*, 81 Minn. 236, 83 N. W. 982.

Neither party is entitled to favorable consideration. Each attempted to prevent judicial investigation of the merits of the controversy, and to gain technical advantage. Each invoked strict rules against the other and neither had just right to complain of the result. If defendant has affirmative claims against plaintiff, as alleged in his answer, the result does not prevent him from asserting them in another action.

Judgment reversed with directions to enter judgment for plaintiff. No statutory costs will be allowed in this court.

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### STATE v. WILLIAM S. FULLERTON.<sup>1</sup>

Nos. 18,328—(9).

December 26, 1913.

#### **State Board of Medical Examiners — retention of license fees.**

1. License fees received by the secretary and treasurer of the State Board of Medical Examiners under Laws 1905, c. 236, and R. L. 1905, §§ 2302, 2303, held properly retained by the board, notwithstanding R. L. 1905, § 66, requiring executive officers to pay into the state treasury all fees and charges received by them except when otherwise expressly provided by law.

February 13, 1914.

#### **Taxing costs against plaintiff — case followed.**

2. Governmental authority is involved in penal actions, in those to enforce

<sup>1</sup> Reported in 144 N. W. 755.

payment of taxes or to determine the legality of the organization of a municipal subdivision of the state, but is not involved in an ordinary action for the recovery of money and property. Hence, in this case, the taxation of costs in favor of defendant is affirmed. *State v. Buckman*, 95 Minn. 272, 278, followed [Reporter].

Action in the district court for Ramsey county to recover \$18,372.75 from the treasurer of the State Board of Medical Examiners. From an order, Catlin, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Affirmed.

*Lyndon A. Smith*, Attorney General, and *William J. Stevenson*, Assistant Attorney General, for appellant.

*Duxbury, Konzett & Pettijohn*, for respondent.

PHILIP E. BROWN, J.

The state appeals from an order sustaining a general demurrer to the complaint.

It claims the right, in the pleading attacked, to recover from defendant, as secretary and treasurer of the State Board of Medical Examiners, all moneys received by him under the provisions of Laws 1905, p. 370, c. 236, and R. L. 1905, §§ 2302, 2303, between January, 1906, and February, 1912. Appropriate allegations are made in this regard, the theory of defendant's liability being predicated upon R. L. 1905, § 66, requiring executive officers of the state to pay into the state treasury all fees and charges collected by them except when otherwise expressly provided by law.

By Laws 1887, p. 46, c. 9, which has been brought forward as R. L. 1905, §§ 2295, 2296, 2298, 2299, and 2300, the legislature established a State Board of Medical Examiners, consisting of nine qualified resident physicians, directed the election of president, secretary, and treasurer, and the holding of meetings at the Capitol at stated times, and authorized the board to examine and license physicians, the applicant to pay a fee of ten dollars "to be applied by said board towards defraying the expenses thereof;"—as expressed in R. L. 1905, § 2296, the phrase is, "pay a fee of ten dollars for the use of the board," but provided no salaries. Chapter 236, *supra*, which is set out in *Williams v. Minnesota State Board of Medical*

Examiners, 120 Minn. 313, 316, 139 N. W. 500, authorized the board, under certain conditions, to license physicians previously licensed by similar boards in other states, with or without examination, and declared that "the fee for such examination shall be fifty dollars." Laws 1891, p. 109, c. 30, now substantially incorporated in R. L. 1905, §§ 2302, 2303, authorized the board to license persons to practice midwifery, and imposed a fee.

The general question involved is: Was it defendant's duty to pay into the state treasury the money in controversy, or any thereof; the state's specific claims being that while the statute appropriated the ten dollar fee "for the use of the board," chapter 236, *supra*, providing for the fifty dollar fee, is an independent act, which omits the phrase quoted; also the midwifery act is likewise independent and distinct legislation, containing no provision authorizing or contemplating retention of fees by the board; hence all fifty dollar and midwifery fees should have been paid into the state treasury. We cannot accede to these claims.

The act of 1905 was not a separate and distinct statute in the sense urged. In *Williams v. Minnesota State Board of Medical Examiners*, *supra*, this act was considered, and we held that the provision authorizing an appeal from the action of the board, found in the last paragraph of Laws 1909, p. 590, c. 474, could not be read into it, because the title thereof purported merely to amend R. L. 1905, § 2296, and further that the amendment related to a different subject-matter; but we were there concerned neither with the doctrine of *in pari materia*, nor with the effect of the act of 1905 except as bearing on the right of appeal. The legislation now under consideration contains nothing indicative of intent that the members of the board should serve the state gratuitously, and the provision authorizing retention of the ten dollar fee accords only with the opposite conclusion. Likewise, it is clear that none of these acts contemplated revenue, except for the purpose of making the board self-sustaining, and it is doubtful if the fees provided for could legally be exacted upon any other theory. Moreover, it is suggestive that no bond is prescribed, and the state's contention is also inconsistent with the practical construction placed upon the statutes by its executive and administrative



officers, which latter is entitled to great weight. See *State v. Sullivan*, 117 Minn. 329, 331, 135 N. W. 748. See also cases cited in 3 Dunnell, Minn. Dig. § 8952. Finally, and pointing to the same conclusion, we have the elementary rule that statutes must be construed with reference to others relating to the same subject.

We must seek the legislative intent, and in the light of the foregoing considerations conclude, notwithstanding the general direction of section 66, *supra*, that the moneys in dispute were properly retained by the board. Fortunately future controversies concerning the fees referred to seem to be set at rest by Laws 1913, p. 158, c. 139.

Order affirmed.

On February 13, 1914, the following opinion was filed:

PER CURIAM.

The clerk's taxation of costs and disbursements in favor of defendant is affirmed. The case is controlled by *State v. Buckman*, 95 Minn. 272, 104 N. W. 240, 289. The present action is not, strictly speaking, one by the state in its governmental capacity, any more than was the *Buckman* case. Each proceeded upon the theory of an alleged property right; in the *Buckman* case, the right to damages for trespass upon state lands, and in this case, the right to money alleged to be the property of the state and to be wrongfully detained by the defendant. The governmental authority was not involved in either action. Such authority is involved in penal actions, in those to enforce the payment of taxes, (*State v. Northwestern Elev. Co.* 101 Minn. 192, 112 N. W. 68) or to determine the legality of the organization of a municipal subdivision of the state, (*State v. Village of Dover*, 113 Minn. 452, 130 N. W. 74, 539) but not in an ordinary action for the recovery of money or property.

Taxation affirmed.

**PETER BOLSTAD v. ARMOUR & COMPANY and Another.<sup>1</sup>**

December 26, 1913.

Nos. 18,359—(165).

**Complaint sufficient.**

1. The complaint in a personal injury action alleged that defendants negligently drove against plaintiff, also that at the time the relation of master and servant existed between defendants, the servant being in charge of the rig. *Held* to state a cause of action against the master.

**Questions for jury — verdict sustained by evidence.**

2. Defendants' negligence and plaintiff's contributory negligence were for the jury and their verdict, approved by the court, is fairly supported by the evidence. It is not based on demonstrably false testimony, nor is it excessive.

**Refusal to charge jury.**

3. It was not error to refuse to give requested instructions as to right of recovery in case certain conduct of the parties was found, the court having given the jury the correct definition whereby to determine whether such conduct constituted negligence, and having stated the effect of negligence upon the verdict.

**Same — right of pedestrian in street.**

4. An instruction suggesting that a pedestrian has not the right to walk on any part of a street except the sidewalks and the crosswalks at the intersection of streets, was properly refused.

Action in the district court for Ramsey county against Armour & Co. and Samuel Carlson to recover \$15,000 for personal injuries. The case was tried before Dickson, J., who at the close of the testimony denied the separate motions of defendants for a directed verdict, and a jury which returned a verdict in favor of plaintiff for \$2,500. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. *Affirmed.*

<sup>1</sup> Reported in 144 N. W. 462.

*Wilson, Mercer, Swan & Stinchfield*, for appellants.  
*Samuel A. Anderson and Henry M. Benson*, for respondent.

HOLT, J.

In the forenoon of February 25, 1911, plaintiff was walking west on Ninth street in St. Paul towards Wabasha street, intending to take a street car for Minneapolis. He was on the southerly side of the street and when within about 30 feet of Wabasha street, hearing the car coming around the corner of Eighth street, he stepped off the sidewalk and walked diagonally across to the corner on the north side of Ninth street where the car stops. He walked fast. When more than half way across he stopped to avoid colliding with a rig coming rapidly from the east, and at that moment a horse and buggy of defendant Armour & Co. in charge of its servant defendant Carlson was, according to plaintiff's claim, driven negligently against him, violently throwing him down, and causing a fracture of the hip and two ribs. Carlson's version is this: As he was driving easterly on Ninth street at a slow trot, when crossing Wabasha street, he noticed plaintiff 20 feet ahead; the latter passed Carlson's path but, apparently confused by the swiftly approaching rig from the east, stepped suddenly back several feet, bumping against the neck of the horse or the front part of the thill of defendants' rig, causing him to fall. In addition to the general allegation that defendants negligently drove upon and against plaintiff, it was specifically alleged that the rig was driven on the wrong side of the street, at a reckless speed, and without keeping a proper lookout. A verdict of \$2,500 was awarded plaintiff, and defendants appeal from the order denying their alternative motion for judgment or a new trial.

Defendant Armour & Co. contends that the complaint fails to state a cause of action against it, because it does not allege that Carlson was engaged in his master's business at the moment of the collision; hence judgment should now be ordered in its favor, since during the entire trial this point was preserved by proper objections and motions. The position is not well taken. The complaint avers that at the time of the injury Carlson was in the employ of Armour & Co. as a driver and in the immediate charge of the rig; also that defendants negli-

gently drove the rig against plaintiff. Acts done by a servant within the scope of his duties and in furtherance of the master's business are deemed the acts of the master and may be pleaded as such. All the negligent acts are charged against both defendants. The complaint stated a good cause of action against Armour & Co., therefore it was not prejudiced by the court's refusal to hear its demurrer filed, but not served, while the action was improperly in the Federal court.

The jury found that the collision was due to defendants' negligence and failed to find any contributory negligence in plaintiff. It is not for us to determine the facts, or weigh the credibility of the witnesses or say that plaintiff's witnesses falsified and did not see the accident. It took place on the border of a street usually congested with travel. It was one of these unexpected occurrences which does not attract the attention of all observers at the same moment or from the same view-point, and is over in a second or two. Therefore it is not surprising that witnesses will disagree as to many of the details. This is not one of the cases where either the verdict or the testimony supporting it may be said to be demonstrably wrong. On the contrary the evidence fairly supports the verdict. Even if the fracture of the thigh of a person 72 years old may be readily accounted for by an ordinary fall on a pavement, it is difficult to see how the ribs could be fractured if the collision took place as stated by defendants' witnesses, considering that plaintiff was heavily clothed, wearing a fur overcoat.

We cannot disturb the verdict as excessive. The injuries were severe and painful. After the lapse of two years plaintiff was unable to walk without crutches. The fracture being close to the joint has resulted in a false joint and a misplaced position of the leg, besides shortening it considerably.

Error is assigned upon the refusal to give certain requested instructions. The vice in the second, eighth and ninth of these is that the court therein is asked to state to the jury that certain specified acts of the parties under certain conditions would prevent a recovery; whereas the proper instructions were to define negligence and contributory negligence, and let the jury determine whether the acts of

the parties in the situation disclosed by the evidence came within the definitions. This the court did accurately and repeatedly. The tenth request was properly refused, for a part thereof was to the effect that if the jury found the left wheels of defendants' rig to have been to the left of the center of the street, but the horse and thill which struck plaintiff were to the right of the center, there could be no recovery on account of the alleged negligence in driving on the wrong side of the street. The negligence of defendants and contributory negligence of plaintiff in the use of the street could not be ascertained by a foot rule. The court fully instructed the jury as to the application of the law of the road to the parties, and no exception was then, or is now, taken thereto.

The propriety of refusing the following instruction may not be entirely free from doubt: "If you find that the plaintiff himself was crossing a public street where vehicles were passing at a point other than at the sidewalk crossing, that would be a circumstance to take into consideration as to whether or not he, himself, was not conducting himself in a negligent manner at the time. The crossings are made with the intention that they will be used by pedestrians and the intervening streets for teams primarily. A speed for a team on a crossing might be negligence which would not be negligence away from the crossing, and crossing in front or between horses in the middle of the block might be negligence when it would not be negligence on the crossing." It is not improper to direct the attention of the jury to the testimony and surrounding circumstances bearing upon the different issues of the case, but, where the evidence is direct, not involving any legal presumptions, and its application to the issues is not difficult, the court is not required to call attention to particular facts and their probative effect. "It is not error for the court in its discretion to refuse to instruct the jury to consider whether certain inferences may not be drawn from any particular state of facts, the evidence being fairly before the jury for their consideration after argument by counsel." *Kellogg v. Village of Janesville*, 34 Minn. 132, 24 N. W. 359. The instruction set out suggests an inference of negligence if a pedestrian crosses a street at any other place than the intersecting street crossings and

states as law that vehicles have rights superior to one on foot in the street outside of the crossings and sidewalks. Such does not appear to be the law, in the absence of legislation on the subject. In *Stallman v. Shea*, 99 Minn. 422, 109 N. W. 824, the court states that "the relative rights of pedestrians and vehicles in a public highway are equal and reciprocal—one has no more rights than the other, and each is obliged to act with due regard to the movements of others entitled to be upon the street. Neither is called upon to anticipate negligence on the part of the other." Section 1086, 2 Elliott, Roads & Streets (3d ed.), thus states the rule: "The fact that a footman undertakes to cross a street at a place other than a regular crossing for footmen will not, of itself, defeat an action against a horseman who negligently injures him by recklessly riding or driving against him."

The following cases confirm the view that, in the absence of statutory prohibition, a pedestrian has the right to walk upon any part of a street or highway. Of course, he must use the care which the ordinary prudent person would use in the same place and under the same conditions. *Moebus v. Herrman*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. 440; *Shapleigh v. Wyman*, 134 Mass. 118; *Diamond v. Cowles*, 174 Fed. 571, 98 C. C. A. 417. In *Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 2 L.R.A. 614, 9 Am. St. 875, the following pertinent language is used: "The plaintiff had the right to cross the street at the crosswalk or elsewhere, exercising such caution and prudence as the circumstances demanded to avoid being injured, while the defendant had the right to ride along the street, observing such watchfulness for footmen, and having his animal under such control, as would enable him to avoid injury to others who had corresponding and reciprocal rights in the street." This was virtually the instruction given by the trial court. See also *Belton v. Baxter*, 58 N. Y. 411; *Simons v. Gaynor*, 89 Ind. 165, and *Vesper v. Lavender*, (Tex. Civ. App.) 149 S. W. 377.

Order affirmed.

**JAMES J. LEONARD v. S. H. FARRINGTON.<sup>1</sup>**

December 26, 1913.

Nos. 18,401—(80).

**Assignment before completion of contract.**

1. One who has contracted to perform certain specified work may assign his claim for the compensation to be received therefor before the work has been completed.

**Same — failure to file — burden of proof.**

2. Failure to file the assignment of a debt as provided by section 7017, G. S. 1913, does not render such assignment absolutely void, but casts upon the assignee the burden of proving that it was made in good faith and for a valuable consideration.

**Decision sustained by evidence.**

3. Evidence examined and *held* to sustain the findings and decision of the trial court.

In garnishment proceedings against the county of Le Sueur in the district court for that county, the garnishee disclosed that its county commissioners had allowed four bills to defendant, but that the warrants which had been drawn had not been delivered. The First National Bank of Waterville intervened and in its complaint alleged a purchase by it from defendant of the bills in question; that the written bills were duly assigned to it; that defendant had no interest in them or to the proceeds thereof since they were so assigned; and that it thereafter notified the garnishee of such assignment. These allegations of the complaint in intervention were denied by plaintiff. The proceeding was heard before Morrison, J., who made findings and ordered judgment in favor of intervener. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

*Charles C. Kolars*, for appellant.

*M. R. Everett* and *Moonan & Moonan*, for respondent.

<sup>1</sup> Reported in 144 N. W. 763.

TAYLOR, C.

Defendant, the publisher of the Waterville Advance, entered into a contract with the county of Le Sueur to publish in the Advance, at prices specified in the contract, the financial statement and the notices and other matter which the county is required to publish in a newspaper. He made out four bills against the county for the agreed price of certain work performed under this contract, and sold and assigned them to the intervener, the First National Bank of Waterville, on January 26, 1912. The bills with the assignments indorsed thereon were filed with the county auditor by the bank on January 29, 1912, and were audited and allowed by the board of county commissioners on February 14, 1912.

Plaintiff, who had recovered a judgment against defendant for \$82.59, in 1905, caused a garnishee summons to be issued thereon and to be served on the county on February 27, 1912. The bank intervened in the garnishment proceedings and the issue as to whether the assignments were valid as against the garnishment was tried before the court without a jury. The court made findings of fact and conclusions of law, sustaining the contention of the bank in all respects. Judgment was entered in accordance with the decision and plaintiff appealed therefrom.

Plaintiff urges that the assignments are invalid because not filed with the clerk of the municipality as required by section 7017, G. S. 1913. As pointed out in *Telford v. Henrickson*, 120 Minn. 427, 139 N. W. 941, this statute does not render such unfiled assignments absolutely void, but merely casts upon the assignee the burden of proving that they were made in good faith and for a valuable consideration.

Plaintiff also urges that the assignment of the bill for publishing the financial statement is void because the law requires this statement to be published three times, and it had been published only once at the time the assignment was made. The other publications were made after the assignment but before the bill was allowed by the county board. It is well settled that one who has contracted to perform certain specified work may assign his claim for the compensation to be received therefor before the work has been performed.



O'Connor v. Meehan, 47 Minn. 247, 49 N. W. 982; Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Burton v. Gage, 85 Minn. 355, 88 N. W. 997; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Dickson v. City of St. Paul, 97 Minn. 258, 106 N. W. 1053; Id. 105 Minn. 165, 117 N. W. 426. Of course the assignee can recover only the amount to which the assignor becomes entitled under his contract.

Ten days after it had taken the assignments, the bank had defendant execute a note for the purpose of avoiding any criticism the bank examiner might make as to the bills, and plaintiff insists that this shows that the bank had not purchased the bills. The court finds as a fact that the bank had made an absolute purchase of the bills on January 26, in good faith and for an adequate consideration, and this finding is supported by ample evidence.

The findings of the trial court dispose of all questions involved in the appeal adversely to plaintiff, and the only question really before this court is whether these findings are supported by the evidence. We have examined the record with care and find that the evidence amply sustains all the findings.

Judgment affirmed.

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## STATE v. SEVERIN LUNDGREN.<sup>1</sup>

December 26, 1913.

Nos. 18,425—(4).

### **Jury panel — challenge.**

1. The discharge of the whole or part of a jury panel, and the summoning of a new one, rests in the sound discretion of the trial court. The fact that

<sup>1</sup> Reported in 144 N. W. 752.

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Note.—The question of criminal liability for violation of liquor law by partner, servant, agent, etc., is treated in notes in 41 L.R.A. 660; 16 L.R.A.(N.S.) 786; 20 L.R.A.(N.S.) 321; and 33 L.R.A.(N.S.) 419.

special veniremen were summoned from only seven, out of 36, towns, cities and villages in the county, and that eight were summoned from one village and others from points near to it, is not ground for challenge to the panel, no bad faith, fraud or oppression being established, and it not appearing that the persons selected were not as a class fair-minded jurors.

**Intoxicating liquor — sale to minor.**

2. To render a sale of liquor to a minor unlawful, it is not necessary that notice forbidding such sale should previously have been given.

**Same — proprietor liable for act of barkeeper.**

3. The act of the barkeeper in selling liquor to a minor is the act of the proprietor; the proprietor must pay the penalty for such sales made by his barkeeper; the delinquency of the barkeeper is the only evidence required to prove the guilt of the proprietor. The fact that the sale was made without the knowledge or assent of the proprietor, and contrary to his instructions, furnishes no defense.

Defendant was indicted by the grand jury of Clay county for the offense of selling intoxicating liquors to a minor, tried and convicted in the district court for that county before Nye, J., and a jury, and sentenced to pay a fine of \$100 and costs of prosecution, and stand committed to the county jail until the fine was paid, for a period not exceeding 90 days. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

*J. M. Witherow, N. I. Johnson and Charles S. Marden, for appellant.*

*Lyndon A. Smith, Attorney General, and C. G. Dosland, County Attorney, for respondent.*

**HALLAM, J.**

Defendant was convicted of the crime of selling liquor to a minor. He raises three questions:

(1) He contends he did not have a fair trial, on the ground that the court discharged part of the regular panel of jurors; that the court issued a special venire directed to the coroner instead of to the sheriff; and that the coroner summoned jurors who were prejudiced against him and not from the county at large, but from one particular locality.

(2) He contends that it is no offense for any person to sell liquor to a minor unless he has been notified not to do so.

(3) He contends that he could be convicted only upon proof of sales made, authorized or approved by him. The sale upon which defendant's conviction is based was made by his bartender, without defendant's knowledge or authority and contrary to his instructions.

1. At the May, 1913, term of the district court of Clay county, a large number of indictments were returned against liquor dealers of Moorhead, charging them with unlawful sale of liquor to minors. The term commenced the first Monday in May. On May 29, after one liquor case had been tried and a jury drawn in a second, the court stated: "It appears here from the character of the litigation, especially criminal cases that are being tried, and that will be tried hereafter in [this] term, that already a large number of the jurors serving at this time are more or less acquainted necessarily with the facts connected with the cases \* \* \* and that it will be more difficult as each case is called to secure out of this panel which is now serving, men who are qualified to act, because of their knowledge of the cases that are being tried, and it appears clearly that men who are serving on the regular panel in this way necessarily gathered a good deal of information, can't help to as to the evidence in these cases as they come up, and Therefore it is Ordered, That all jurors not serving on the present case \* \* \* (State v. Toole) will be discharged from further attendance at this term \* \* \* . There will be a special venire as soon as conveniently can be." Thereupon the county attorney filed an affidavit of prejudice against the sheriff, under G. S. 1913, § 993, and a special venire issued to the coroner, and that officer summoned 20 jurors. The jurors sitting in the Toole case, being eight of the regular panel and four summoned under a previous special venire, continued to serve until defendant's case was called, and some of them were called to the jury box upon his trial. Defendant, when his case was called, challenged the panel of petit jurors. The challenge was denied by the state and was found not true by the court.

Defendant urges that the course pursued by the court was error, and that he was not accorded a fair trial. We cannot so hold.

It is true, there is no express statutory authority for the dismissal of either the whole or part of the regular panel. But we are of the opinion that this was in the sound discretion of the court. *Barney v. State*, 49 Neb. 515, 68 N. W. 636; *Fanton v. State*, 50 Neb. 351, 69 N. W. 953, 36 L.R.A. 158; *Simmons v. Cunningham*, 4 Idaho, 426, 39 Pac. 1109. See *State v. Strait*, 94 Minn. 384, 102 N. W. 913; *State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L.R.A. 324. The powers of a trial court during the progress of a term of court cannot be too much circumscribed. Rules of practice and procedure must have some elasticity. The administration of the law is a practical matter, and much must be left to the wisdom and judgment of the presiding judge. No one can doubt that under certain circumstances the discharge of a whole jury panel and the summoning of a new one may be in the interest of a proper administration of justice. We are not prepared to say that this was not such a case.

This action of the court caused a deficiency of jurors. In case of a deficiency of jurors from any cause, the court is authorized by statute to supply the deficiency by ordering a special venire to issue to the sheriff, or, in the event of his disqualification, to the coroner, commanding him to summon a specified number of jurors "from the county at large." G. S. 1913, §§ 166, 993. The court proceeded to supply the deficiency of jurors in the manner prescribed by statute.

Complaint is made that the coroner did not select these jurors "from the county at large." The jurors summoned were from seven towns, cities and villages out of a total of 36 in the county. Eight of the 20 were selected from the village of Hawley, and two others within a mile thereof. We should have been better satisfied had the coroner made his selection over a wider area, yet we cannot say that this was ground for challenge to the panel. We are of the opinion that no bad faith or fraud or oppression was established. It is not always practicable to select a special panel from every corner of the county, and this is not required. *State v. Arthur*, 39 Iowa, 631. Those selected were for the most part from localities remote from Moorhead, the seat of this litigation, and might be expected to be more free from local prejudice than jurors summoned from

nearer points. After all, the important consideration is the selection of men who are in fact fair-minded jurors. We find no just basis for the charge that the jurors selected by the coroner were not, as a class, fair jurors. The court tried out all these questions as questions of fact on the challenge to the panel. G. S. 1913, § 9227. The challenge was "found not true," and we must hold that the record sustains this finding.

It is claimed that individual jurors summoned were prejudiced. If this be true, it is no ground for a challenge to the panel. This objection must be reached by challenge of individual jurors for bias. Challenge to the panel "can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury." G. S. 1913, § 9225.

Complaint is made that the court retained part of the original panel in service. Those retained were at the time serving upon a case. We cannot regard this as error.

2. The second contention is that, under the statutes of this state in force when this offense was committed, the sale of liquor to a minor was not unlawful unless notice forbidding it has previously been given to the person making the sale. The statute reads as follows:

"It shall be unlawful for any person, except a licensed pharmacist \* \* \* to sell \* \* \* any spirituous, vinous, malt or fermented liquors \* \* \* to any minor person, or to any pupil or student of any school or other educational institution in this state, or to any intoxicated person, or to any person of Indian blood, or to any habitual drunkard, or to any public prostitute, or to a spendthrift or an improvident person, within one year after written notice by any peace officer, parent, guardian, master, employer, relative, or by any person annoyed or injured by the intoxication of such spendthrift or improvident person, forbidding the sale of liquor to any such spendthrift or improvident person." Chapter 83, p. 102, Laws 1911.

Defendant contends that the last clause making written notice "within one year" an element of the offense, applies to each and all of the prohibitions that precede it, and that it is no offense to sell to persons in any of the prohibited classes unless such notice has pre-

viously been given. We cannot so construe the statute. We think it manifest that the provision as to "notice" applies only to sales to a "spendthrift or improvident person." The notice is given by "any peace officer, parent, guardian, master, employer, relative, or by any person annoyed or injured by the intoxication of such spendthrift or improvident person forbidding the sale of liquor to any such spendthrift or improvident person." Clearly the whole of this qualifying language is to be taken together, and, if taken altogether, it is clear that the notice mentioned is a notice "forbidding the sale of liquor to any such spendthrift or improvident person," and none other. There are reasons which doubtless appealed to the legislature for making this distinction in the case of a "spendthrift or improvident person" which do not apply to the other classes mentioned. The quality of improvidence is not so easily defined or distinguished that men will ordinarily be charged with knowledge of it, unless it is brought to their attention. On the other hand, it is plain that if the requirement as to notice is applied to other members of the prohibited class, such as minors, Indians, and intoxicated persons, the prohibitions of the law would be of little practical effect.

3. Defendant's next contention challenges certain instructions given by the court to the jury, and raises the question whether defendant could be convicted upon evidence of a sale made by his bartender, without defendant's knowledge or consent, and contrary to his orders. The statute provides as follows:

"Any sale of liquor in or from any public drinking place by any clerk, barkeeper, or other employee authorized to sell liquor in such place shall be deemed the act of the employer as well as that of the person actually making the sale; and every such employer shall be liable to all the penalties provided by law for such sale, equally with the person actually making the same." R. L. 1905, § 1565; G. S. 1913, § 3191.

This language plainly means that the act of the barkeeper is the act of the proprietor; that the proprietor must pay the penalty for sales made by his barkeeper in violation of the law, and that the delinquency of the barkeeper is the only evidence required to prove the guilt of the proprietor. The fact that the sale was made without

the knowledge or assent of the proprietor and contrary to his general instructions furnishes no defense. The language of the statute is susceptible of no other construction. The offense is one of the class where proof of criminal intent is not essential. The statute makes the act an offense, and imposes a penalty for violation of the law, irrespective of knowledge or intent. *State v. Heck*, 23 Minn. 549; *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L.R.A. 667; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526.

The statute is drastic in its terms, but the legislature was doubtless of the opinion that drastic measures are required to accomplish the purpose of enforcement of laws regulating the sale of intoxicating liquors. The law was in existence when the offense was committed. It was a notice to every man choosing to follow this line of business that he must control his own business and the men he employs in it, and that he is bound under penalty of the law to employ only men who will not commit crime in his name.

It is contended that the act is unconstitutional as special legislation, under section 33, article 4, of the Constitution, which provides that "in all cases when a general law can be made applicable no special law shall be enacted." We cannot so hold. This is a general law. To hold otherwise, would be to declare invalid all laws relating to the sale of intoxicating liquors.

Statutes such as this are common in other states, and have been generally sustained. *Black, Intox. Liquors*, § 370; 23 Cyc. 208; *Robinson & Warren v. State*, 38 Ark. 641; *Loeb v. State*, 75 Ga. 258; *McCutcheon v. The People*, 69 Ill. 601; *Noecker v. The People*, 91 Ill. 494; *State v. McConnell*, 90 Iowa, 197, 57 N. W. 707; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484; *State v. McGinnis*, 38 Mo. App. 15; *State v. Grant*, 20 S. D. 164, 105 N. W. 97, 11 Ann. Cas. 1017; *State v. Gilmore*, 80 Vt. 514, 68 Atl. 658, 16 L.R.A. (N.S.) 786, 13 Ann. Cas. 321; *State v. Denoon*, 31 W. Va. 122, 5 S. E. 315.

This case is clearly distinguishable from *State v. Mahoney*, 23 Minn. 181; *State v. Mueller*, 38 Minn. 497, 38 N. W. 691; *State v. Austin*, 74 Minn. 463, 77 N. W. 301. The statute considered by

the court in those cases did not make the act of the employee the act of the employer, and did not purport to impose penalties upon the employer for the delinquences of the employee. *State v. Nugent*, 108 Minn. 267, 121 N. W. 898, arose under the statute now before us, but the question of sale by a barkeeper without authority was not involved.

Order affirmed.

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### HULDA PLOETZ v. L. J. HOLT and Another.<sup>1</sup>

December 26, 1913.

Nos. 18,438—(122).

#### Automobile — liability of owner for injury caused.

1. The owner of an automobile is liable for injuries resulting from the negligence of the person operating it, only when such negligence occurs while it is being used by his express or implied authority for some purpose for which it is kept by him.

#### Questions for jury.

2. Evidence examined and *held* sufficient to require the court to submit to the jury the question as to whether the accident resulted from the negligence of defendant Neil Holt, and also the question as to whether the machine was being used for a purpose for which it was kept by defendant L. J. Holt and by his implied permission.

#### Evidence inadmissible.

3. Evidence tending to show negligence on the part of the driver of the team frightened by the auto was properly excluded as such negligence is not imputed to plaintiff, a passenger.

<sup>1</sup> Reported in 144 N. W. 745.

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Note.—The authorities on the question of the responsibility of owner of automobile when car is being used by servant or another for his own pleasure or business are discussed in notes in 1 L.R.A.(N.S.) 235; 9 L.R.A.(N.S.) 1033; 14 L.R.A.(N.S.) 216; 21 L.R.A.(N.S.) 93; 26 L.R.A.(N.S.) 382; 33 L.R.A.(N.S.) 79; and 37 L.R.A.(N.S.) 834. And upon the question of liability where automobile is being used by a member of owner's family, see note in 41 L.R.A.(N.S.) 775.



**Verdict excessive.**

4. Verdict *held* excessive and a new trial granted unless plaintiff consent to reduce the same to the sum of \$3,000.

Action in the district court for Winona county against L. J. Holt and Neil Holt to recover \$5,000 for personal injuries. The complaint alleged that the motor vehicle owned by L. J. Holt was kept and used by him as a family vehicle for the convenience and pleasure of his family, including his son Neil, who was permitted by him to operate it as a family vehicle for the use, convenience and pleasure of the wife and family of L. J. Holt, and their friends and guests, and that one of the duties and privileges of said Neil under his employment by L. J. Holt and the family relationship existing between them was to drive and operate the motor vehicle in conveying L. J. Holt and wife, and the members of his family and their guests, from place to place as they might desire. It also alleged that defendant Neil, while occupying that relationship to L. J. Holt and while in his service and with his authority, on the day in question drove the motor vehicle from the residence of the father to the home of a neighbor, for the purpose of carrying L. J. Holt's wife to her home, and while so engaged drove and operated it in a reckless and negligent manner in the direction of the horses attached to the vehicle in which plaintiff was seated, caused the motor vehicle to give out a loud and terrifying noise calculated to frighten horses of ordinary gentleness; that plaintiff's husband signalled and requested said Neil to stop his vehicle and desist from frightening the horses, but defendant Neil negligently failed to do so, and continued to drive the vehicle toward the horses and to sound the horn upon it and still further terrify the horses, and as a direct result of such negligent conduct the horses became uncontrollable from fright and ran away and to escape from immediate serious injury plaintiff threw herself from the carriage and was seriously injured. These allegations of the complaint were denied in the separate answers of defendants.

The case was tried before Snow, J., who at the close of the testimony denied the motion of defendant L. J. Holt for a directed verdict and for a dismissal of the action, and a jury which returned a

verdict against both defendants for the sum of \$5,000. From an order denying defendant L. J. Holt's motion for judgment in his favor notwithstanding the verdict or for a new trial as against himself, and denying the motion of defendant Neil for a new trial, both defendants appealed separately. Order denying judgment notwithstanding verdict affirmed. Order denying a new trial reversed and new trial granted, unless plaintiff consented to a reduction of the verdict to \$3,000.

*H. M. Lamberton and Robert E. Looby, for appellants.*

*W. H. Markham and Webber & Lees, for respondent.*

TAYLOR, C.

The parties to this action are farmers residing in the same neighborhood in Winona county. On the afternoon of June 8, 1911, the ladies aid society of the local church held a meeting at the home of one of its members which was attended by plaintiff and by the wife and daughters of defendant L. J. Holt. At the close of the meeting plaintiff's husband came with a team and buggy to take her home. After she had seated herself in the buggy, but while her husband was still standing upon the ground, defendant Neil Holt drove an automobile owned by his father, defendant L. J. Holt, in close proximity to the team, which became frightened and ran away. Plaintiff jumped from the buggy and sustained a "compound Potts fracture" of the left ankle. She brought suit for damages and recovered a verdict of \$5,000 against both defendants. Defendant L. J. Holt made a motion for judgment notwithstanding the verdict, and in case that should be denied then for a new trial. Defendant Neil Holt also made a motion for a new trial. Both motions were denied and both defendants appealed.

The verdict necessarily involved a finding that defendant Neil Holt was chargeable with negligence, and that such negligence brought about the accident. Defendants, in effect, concede that the evidence was conflicting upon this question, but urge that it did not preponderate in favor of plaintiff. The jury found otherwise and the evidence is ample to sustain their finding.

It is strenuously contended, however, that defendant L. J. Holt

is not responsible for the damages resulting from the negligence of defendant Neil Holt. On the day of the accident, L. J. Holt left home in the morning and did not return until evening. He left the car at home in a shed and did not know that it was taken out or used. Neil Holt was of age and had been in business for himself, but had hired out to his father to work upon the farm during the season of 1911, except during sheep-shearing time. Neil possessed a sheep-shearing machine and reserved the privilege of making what he could with this machine at the proper season. He lived at his father's home as a member of the family, except when away shearing sheep. A few days before the accident, he seems to have suspended work under his contract of hiring, and to have engaged in the business of shearing sheep. On the day of the accident he was engaged in shearing his father's sheep, not under his contract of hiring, but, apparently, at the same fixed price per head for which he performed such work for others. He completed his job about five o'clock. He and a younger brother who had been assisting him were the only ones then at home. They concluded to take the car and go over to the neighbor's where the ladies society was in session for supper. In doing so they appear to have acted wholly of their own volition and without any expectation on the part of the parents that they would go to the neighbor's or use the car. Neil had driven the car from time to time ever since his father had owned it, but the members of the Holt family testified that he had never taken it previously without first asking and obtaining his father's express permission.

Whether the owner of an automobile is responsible for injuries resulting from the negligence of the person operating it, is determined by the rules which govern the relation of master and servant. His liability rests upon the proposition that the principal is responsible for the wrongful or negligent acts of his agent or servant, committed while acting under his express or implied authority and in furtherance of his business. He is not liable for the acts of such agent or servant committed while the latter is engaged exclusively upon his own affairs. If the master authorize the servant to use an instrumentality provided by him, and the servant negligently uses it so as to cause injury to another, the master is liable therefor, if

the servant, at the time, was engaged in the business of the master; but is not liable therefor, if the servant, at the time, was not engaged in the business of the master, but was using the instrumentality for his own purposes. The rule is tersely stated by Chief Justice Start in *McLaughlin v. Cloquet Tie & Post Co.* 119 Minn. 454, 138 N. W. 434, as follows: "The settled rule of this court, stated abstractly, is to the effect that a master is only liable for the wrongful act of his servant when it is done in the course of and within the scope of his employment."

There is no controversy as to the general rule, but it is frequently difficult to apply it to the facts of a particular case. Prior decisions of this court have dealt with the application of the rule so exhaustively and have analyzed the cases bearing thereon so fully that a further discussion herein seems unnecessary. See among others: *Slater v. Advance Thresher Co.* 97 Minn. 305, 107 N. W. 133, 5 L.R.A. (N.S.) 598; *Merrill v. Coates*, 101 Minn. 43, 111 N. W. 836; *Rudd v. Fox*, 112 Minn. 477, 128 N. W. 675; *Penas v. Chicago, M. & St. P. Ry. Co.* 112 Minn. 203, 127 N. W. 926, 30 L.R.A. (N.S.) 627, 140 Am. St. 470; *McLaughlin v. Cloquet Tie & Post Co.* 119 Minn. 454, 138 N. W. 434; *Sina v. Carlson*, 120 Minn. 283, 139 N. W. 601; *Geiss v. Twin City Taxicab Co.* 120 Minn. 368, 139 N. W. 611; *Meyers v. Tri-State Automobile Co.* 121 Minn. 68, 140 N. W. 184; *Burnham v. Elk Laundry Co.* 121 Minn. 1, 139 N. W. 1069.

The tendency of the courts in this class of cases is to resolve doubts against the master to the extent of submitting the question as one of fact to the jury. The court submitted this case to the jury in a very clear and accurate charge. Among other things he said: "In order to hold L. J. Holt responsible for the negligence of Neil Holt on the occasion in question, if Neil Holt was guilty of negligence, it must appear by a fair preponderance of the evidence that Neil Holt at the time in question was using the automobile with either express or implied authority from L. J. Holt, and in serving some purpose for which the machine was procured and kept by the father, L. J. Holt." He also said: "That if the purpose of taking the automobile by Neil Holt was simply to serve the pleasure of himself and his brother, who, it would appear, was past majority in age, that L. J.

Holt would not be bound." These propositions were both impressed upon the attention of the jury repeatedly. By their verdict the jury necessarily found "that Neil Holt at the time in question was using the automobile with either express or implied authority from L. J. Holt, and in serving some purpose for which the machine was procured and kept by the father, L. J. Holt."

The question presented to this court is whether the evidence to the contrary is conclusive, and thus required the trial court to hold as a matter of law that no liability existed as against the father. Such cars are usually procured and kept for the use of the family, and, ordinarily, such use is not limited to any special purpose. At the time in question the father was absent and the mother and minor children were at a neighbor's. It does not appear that the father had ever placed any restrictions upon the use of the car. The various members of the family had ridden in it frequently. Neil had operated it from time to time ever since its purchase. While he had been accustomed to obtain express permission before taking it, there is no evidence that he had ever been forbidden to use it without first obtaining such permission. His use of the car is presumed to have been rightful until the contrary is shown. If, at the time, it was being used in part for the purposes for which it was kept by the father, the fact that Neil may also have been using it in part for purposes personal to himself, would not necessarily absolve the father from liability. We think the circumstances shown by the evidence are such that the jury might infer therefrom that among the purposes for which Neil took the machine was that of bringing home his mother and sisters, and that he had implied authority to do so. We think there was sufficient evidence so that the court could not determine the question as a matter of law and was required to submit it to the jury.

We find no prejudicial errors in the charge or in the rulings on the admission of evidence. If negligence on the part of plaintiff's husband in failing to keep proper control over his team concurred in bringing about the accident, such negligence is not imputed to plaintiff. *Howe v. Minneapolis, St. P. & S. S. M. Ry. Co.* 62 Minn. 71, 64 N. W. 102, 30 L.R.A. 684, 54 Am. St. 616; *Finley v. Chicago,*

M. & St. P. Ry. Co. 71 Minn. 471, 74 N. W. 174; Lammers v. Great Northern Ry. Co. 82 Minn. 120, 84 N. W. 728. And evidence tending to show such negligence was properly excluded.

It is contended that the verdict of \$5,000 is excessive. Both bones were broken at the ankle joint. The bones have united, what is termed a good recovery has taken place, and the leg is of normal length. The ligaments at the joint were injured, the freedom of motion is impaired, and the ankle is weak and may remain so. It is a delicate matter for this court to interfere with the award of damages in such cases but sometimes it becomes necessary to do so. In Slette v. Great Northern Ry. Co. 53 Minn. 341, 55 N. W. 137, the injury was a fracture of a thigh bone which shortened the leg one-half to three-fourths of an inch. A verdict of \$4,100 was reduced to \$2,100. In Kennedy v. St. Paul City Ry. Co. 59 Minn. 45, 60 N. W. 810, no bones had been broken, but it was contended that the ligaments at the ankle had been distended or torn from their attachments which rendered the ankle weak and that it would remain so. A verdict of \$3,100 was reduced to \$2,100. In Johnson v. St. Paul City Ry. Co. 67 Minn. 260, 69 N. W. 900, 36 L.R.A. 586, one of the bones of the outer side of the ankle had been broken, the ligaments of the ankle had been torn and the joint injured. The plaintiff was 75 years of age and the injury compelled her to use crutches permanently. A verdict of \$4,000 was reduced to \$2,500. In Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241, both bones were broken near the ankle and the ligaments and flesh over them and the ankle joint were torn loose. A verdict of \$2,500 was reduced to \$2,000 by the trial court and was held not excessive. In Denchfield v. Minneapolis, St. P. & S. S. M. Ry. Co. 114 Minn. 58, 130 N. W. 551, one bone of the leg was broken below the knee and the knee and ankle were stiff. A verdict of \$4,100 was reduced to \$3,000. In Pickell v. St. Paul City Ry. Co. 120 Minn. 340, 139 N. W. 616, a verdict of \$2,500 in favor of a girl seven years of age whose leg was broken and shortened three-fourths of an inch was approved as not excessive. In Peaslee v. Railway Transfer Co. of Minneapolis, 120 Minn. 347, 139 N. W. 613, plaintiff's leg was broken and severely injured near the hip, which resulted in shortening the leg an

inch and a quarter and in other permanent injuries. A verdict of \$4,158 was sustained with some hesitation.

While plaintiff sustained a serious injury, the bones have united perfectly and the leg is of normal length, but the ligaments at the joint were injured and the ankle is weak. The movement of the joint is impeded by the "callus" thrown out around the break in the bone, and the weakness of the ankle renders it necessary to wear an ankle brace, but both these conditions usually improve with time.

We deem the verdict excessive. The order denying the motion of defendant L. J. Holt for judgment notwithstanding the verdict is affirmed. The order denying the motion for a new trial is reversed as to both defendants and a new trial granted, unless within 20 days after the filing of the mandate from this court to the district court, the respondent shall file in the latter court her consent that the verdict and the judgment to be entered therein be reduced to the sum of \$3,000 and that, if such consent be filed, the orders denying a new trial shall stand and be affirmed.

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### FRANCES BURNS and Another v. LUCRETIA BURNS.<sup>1</sup>

December 26, 1913.

Nos. 18,473—(281).

#### **Second mortgagee without right of redemption.**

1. The evidence sustains the finding that a mortgage was without consideration, and the legal conclusion that the mortgagee named in such mortgage has not the right to redeem from the foreclosure of a prior mortgage.

#### **Deed and mortgage—exclusion of evidence.**

2. Appellant and her husband made a deed to the latter's brother of land to which she held the legal unrecorded title, the husband took the deed to the brother and delivered it upon receiving a surrender of the equities of the brother to land, the legal title whereof was in appellant's

<sup>1</sup> Reported in 144 N. W. 761.

husband, and the balance of the agreed consideration in money, thereupon a mortgage without any consideration was executed to appellant to protect the mortgagors against their own improvidence; *held*, that it was not error to exclude evidence concerning appellant's purchase of the land so conveyed nor as to her secret instructions to her husband respecting the delivery of the deed.

**Estoppel of plaintiff.**

3. The mortgage to appellant caused no legal fraud and plaintiff is not estopped from asking its cancelation.

**Action to enjoin maintainable.**

4. Plaintiff and intervener are entitled to maintain this action by virtue of their interest in the land to which the mortgage relates.

**When right of action accrues.**

5. Plaintiff's cause of action did not accrue until appellant refused to release the mortgage or until she asserted its validity.

Action in the district court for Big Stone county by plaintiff individually, and as administratrix of the estate of Luke Burns, deceased, for an injunction to restrain defendant from redeeming from the foreclosure of a certain mortgage by virtue of a pretended mortgage for \$4,500; that the mortgage be adjudged void and that defendant be held to have no right thereunder. Defendant in her answer set up a redemption from the sale, and for a counterclaim and cross bill inserted the allegations for an action to determine adverse claims. The Big Stone County Bank intervened and in its complaint set up the foreclosure of the mortgage held by it, the invalidity of defendant's \$4,500 mortgage, and prayed that the mortgage be adjudged to be fraudulent and void. The case was tried before Flaherty, J., who found that the mortgage for \$4,500 was void and of no legal effect; furnished no lien or basis upon which defendant could predicate a right or claim to redeem the land from the foreclosure sale, and ordered judgment in favor of plaintiff and intervener. Defendant's motion for amended findings was denied. From an order denying her motion for a new trial, defendant appealed. Affirmed.

*F. W. Murphy*, for appellant.

*Cliff & Purcell*, for respondent.



HOLT, J.

Action brought to enjoin a mortgagee from redeeming, on the ground that the mortgage was without consideration, and to have it adjudged void. Decision for plaintiff, and appeal by defendant from the order denying a new trial.

The facts are substantially these: In 1879 Luke Burns, the deceased husband of plaintiff, and his brother, Charles J. Burns, the deceased husband of defendant, each located upon 160 acres of government land in Big Stone county. Luke acquired the northwest quarter of section 34, township 124, range 45, by complying with the homestead act, and Charles the southwest quarter of the same section under the pre-emption act. In 1892 Charles obtained patent to the northeast quarter in the same section under the tree-claim act. Charles never took up his residence on the land, except such as was necessary to comply with the pre-emption law. He appears to have resided subsequent to 1882 at Stillwater, where he was engaged in business. He always owned a number of draft horses, used during the winter in logging. These were sent up to Luke in the summer to be pastured and for farm work as needed. During all the time, up to the fall of 1905, Luke farmed his own and Charles' land as one farm, planted and cared for the tree claim, and Charles came up once or twice a year when some kind of settlement of the farming operations or division of the crops was made. The inference from the record is that Luke was not thrifty, was prone to run into debt, and, having a large family, had a hard time to make both ends meet. Charles evidently assisted him both financially and otherwise. After Luke became entitled to a patent, he took up his residence on Charles' farm, namely: The southwest quarter; this continued to be his home until his death in 1910. For obvious reasons Luke, very soon after receiving the patent to his land, caused the title to be vested in his wife, who held it until 1895 when it was deeded to Charles, and he continued the record owner up to his death. In 1890 financial difficulties threatened Charles and he conveyed the southwest quarter to his brother-in-law, Lyman, who thereafter until December 6, 1905, held the legal record title, but in 1894 Lyman gave a deed to defendant which was never recorded until December

6, 1905. By deed delivered December 5, 1905, and recorded the next day, defendant and her husband conveyed the southwest quarter to Luke, and at the same time he and plaintiff gave a first mortgage to the intervener for \$2,300 and a second mortgage to defendant for \$4,500, both recorded on December 6, 1905. In January, 1909, Luke and his wife conveyed, with warranty against encumbrances, the southwest quarter and some personal property to O'Brien Land Co. for \$6,500. It was agreed that the land company should pay the first mortgage of \$2,300 to the intervener and the balance of the purchase price to the grantors, when the \$4,500 mortgage held by defendant was released. Defendant refused to release. Thereupon the first mortgage was foreclosed by the intervener at the request of plaintiff, with the consent of the land company, for the purpose of passing title to the intervener for the benefit of plaintiff and her grantees; it being understood between the parties that when the title was thus perfected, on the assumption that defendant would or could not redeem, plaintiff was to receive the balance of the purchase price. Under this agreement the land was bid in by intervener. But contrary to expectation defendant attempted to redeem, and this action was brought by plaintiff personally and as administratrix of her husband's estate to prevent redemption.

Plaintiff's claim is that defendant's mortgage was wholly without consideration and was given and accepted solely for the purpose of protecting the mortgagors against their own imprudent ways of contracting debts, therefore it cannot serve as a basis for redemption and may be removed as a cloud on the title. It is apparent that the trial court concluded that, notwithstanding the title to the north half of the section had stood of record in Charles for more than 10 years prior to December 5, 1905, Luke in fact owned the west 160 acres and an undivided half of the east 160 acres, the tree claim; also that Charles had always up to that date continued to be the true owner of the southwest quarter, although the record title stood in Lyman and defendant had the unrecorded legal title. The evidence disclosed clearly that no matter who held the paper title or record title to these three quarter sections of land, Luke was the actual owner of the northwest quarter and Charles of the southwest quarter, while the

northeast quarter, or tree claim, was joint property, and that such ownership was continuous from the time the land was entered up to December 5, 1905. Luke during all the time farmed the cultivated parts of all the tracts. Charles and Luke were the only ones who concerned themselves about the lands or crops. Defendant does not claim that she ever gave any directions concerning the land during the 11 years the paper title rested in her; or shared in the crops, in fact, she said she never had any business with Luke and did not know how affairs stood between the brothers. It is true she wished their business relations terminated, evidently because she did not consider them profitable to her husband.

In this situation no error is perceived in the admission of the testimony of Thomas Burns and the O'Briens as to the settlement and division of the property between Luke and Charles on December 5, 1905. From their testimony the mind is forced to the conclusion that Charles held the title to the northwest quarter in trust for Luke and that the latter equitably owned a half interest in the tree claim; that the brothers wished to divide up the tree claim and settle all matters between them; that to accomplish this to the best advantage they traded the farms, Luke getting Charles' original farm with buildings and Charles receiving Luke's homestead claim and his interest in the tree claim; and by so doing sufficient money could be raised by a first mortgage to pay Luke's debt to Charles and the \$700 on Luke's homestead, thus giving Charles the north half of the section free from encumbrances. This arrangement was fully carried out. And we might say, here was an executed parol trust. *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295. If the southwest quarter was in reality the land of defendant's husband and she let him take the deed for the purpose of disposing of it to Luke, and he did so, receiving as the full agreed consideration Luke's homestead, and interest in the tree claim, then the additional mortgage was without consideration.

Defendant also claims that the court erred in excluding evidence as to what she paid for the southwest quarter, not that Lyman got anything, but that she had received \$600 from an estate which Charles had invested in lots and afterwards sold using the money and allow-

ing her this land; also in rejecting testimony of her instructions to Charles when he went up to settle with Luke. We do not think there was prejudicial error in either ruling. The ownership of the land was not a direct issue in the case, at most it was a circumstance throwing light on the proposition whether defendant's mortgage was without consideration. She admits sending her husband to Luke with a deed and that no set purchase price was fixed. He saw fit to accept the real estate of Luke and the proceeds of the first mortgage in full payment for the deed. She now as sole heir of her husband has what Luke and plaintiff parted with. Her secret instructions to her husband as to the deal cannot bind plaintiff or Luke. And in that situation defendant ought not to be heard to complain even if she, and not Charles, had been the true owner of the land. She has succeeded to all that Luke parted with for the land according to the agreement of her husband, and this second mortgage which he agreed should be held merely as a protection to Luke, without any consideration whatever, should also be considered so held by her.

As before indicated the real issue in the case was whether defendant's mortgage was without consideration; and if it was, the further legal question, does it give defendant the right to redeem from the foreclosure of the first mortgage? The court's finding that it was without consideration is amply supported. There is evidence, not only of the actual agreement between the brothers, but that Charles first tried to induce the brother Thomas to take the mortgage so as to prevent Luke from obtaining credit, to serve as a "cloak," as he stated, and when Thomas refused he concluded to make it out to defendant; that there was no consideration for it whatever, the full purchase price of the land being otherwise paid as above stated; that no interest was ever paid or demanded on the mortgage, and that defendant did not know of its existence until after Charles' death, when it was found among his papers. Her own letter when requested to release the land contradicts in a measure her present claim and indicates that she knew nothing of the origin of the mortgage.

But it is claimed plaintiff has no standing in court, for the reason that the court found that it was also the purpose to put Luke's property beyond the reach of his creditors, hence fraud taints the trans-

action in which plaintiff and Luke took part. The scheme was not legal fraud on future creditors. There was no evidence of existing creditors nor, indeed, of subsequent. Neither findings nor evidence create an estoppel against plaintiff. *Anderson v. Lee*, 73 Minn. 397, 76 N. W. 24, is authority for plaintiff's right to have the mortgage cancelled. Again, it is urged no right exists in either plaintiff or intervener to equitable relief. Plaintiff and her husband conveyed warranting against this encumbrance, she personally and as administratrix is unable to get the full purchase price until this cloud upon the title is removed. We think the action may be maintained by plaintiff and also by the intervener who, under an oral agreement with plaintiff, which defendant has no right to question, foreclosed the mortgage and became the purchaser at the sale in order to perfect title in plaintiff's grantees, on the theory that defendant's mortgage was void and no redemption would or could be made thereunder.

Defendant makes the point that the statute of limitations has run, reasoning thus: The mortgage was a scheme to defraud of which plaintiff was cognizant when it was given and the action then accrued. Not so, the cause of action arose when defendant refused to release and sought to assert a right under an invalid instrument. Furthermore, the action involves removing a cloud upon title and clearly is not barred.

We do not question the authorities cited by appellant, but, to the facts as here disclosed by the evidence and findings, they are not applicable, and hence fail to convince us that any error prejudicial to appellant is in the record. A criticism of the finding to the effect that the settlement of December 5, 1905, settled and adjusted not only the affairs and property of Luke and Charles but also of plaintiff and defendant, is without merit, for the transaction related to land. Plaintiff had an inchoate right to the north half of the section, and defendant at least the same right in the southwest quarter.

No useful purpose would be served by any further discussion of the many errors assigned. An attentive examination of all the testimony leads to an abiding conviction in the correctness and justice of the rulings and decision of the learned trial court.

Order affirmed.

ITASCA CEDAR & TIE COMPANY v. GEORGE A.  
McKINLEY and Another.<sup>1</sup>

January 2, 1914.

Nos. 18,181—(32).

**Assignment of contract—material in process of manufacture.**

1. Plaintiff in replevin claimed title under certain contracts of sale. Under the first contract one of defendants agreed to manufacture and deliver to plaintiff certain timber products. It is conceded that no title passed under this contract. Defendant proceeded to fulfil the contract, manufacturing part of the material himself and procuring part to be manufactured by others. Later a second contract was made, by the terms of which defendant assigned to plaintiff "all interest in all contracts he has of every nature and description for the manufacture and sale of material of the kinds mentioned in said (first) contract." *Held*, that this did not operate to assign to plaintiff the contract between plaintiff and defendant, and did not pass title to material in process of manufacture by defendant himself.

**Evidence of value—testimony of expert.**

2. Defendant McKinley was the owner of cedar telegraph poles taken in replevin. Some he had purchased and some he had manufactured himself, participating in the work of getting the material out of the woods, taking it from the river and sorting and manufacturing it in the yard. With plaintiff's president he spent three weeks making an estimate of the material in piles. Still later, as the material was loaded out of the yard, he was on the ground nearly all the time. He was an experienced timber man and familiar with values. McKinley's evidence was competent.

**Evidence of value.**

3. Plaintiff's president testified that the estimate made by himself and McKinley amounted to \$35,000 or \$40,000, and that it covered all but about 6,000 pieces. Defendants offered to prove that it covered not more

<sup>1</sup> Reported in 144 N. W. 768.

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Note.—On the question what is provable by books of account, generally, see note in 52 L.R.A. 689. And as to party's books of account as evidence in his own favor, see note in 52 L.R.A. 546. And for books of account as evidence between other parties, see note in 53 L.R.A. 513.

than half of the yard. The evidence was proper and should have been received.

**Evidence of cost of manufacture.**

4. Plaintiff offered proof that the actual cost of completing the manufacture and delivery of the material taken in replevin was \$12,000, and that this was the reasonable value thereof. Defendants offered to prove by defendant McKinley that the reasonable cost of such manufacture and delivery did not exceed \$5,000. McKinley was familiar with the cost of manufacture. The evidence should have been received.

**Evidence of admission.**

5. Defendants offered proof that plaintiff's president stated, in the course of negotiation on this subject, that it would cost from \$4,000 to \$5,000 to complete the manufacture and delivery of this material. The evidence was proper as proof of an admission, and should have been received.

**Books of account.**

6. Plaintiff's books of account, showing the amount and character of material sold and the cash transactions incident thereto, made in the usual course of business, and properly verified, were admissible in evidence, although part of the entries were made from reports of persons not employed by plaintiff, since these reports were produced and verified on the stand by the persons making them. The fact that some of the entries were made after suit was brought did not render them inadmissible.

**Memorandum inadmissible.**

7. A memorandum of an inventory taken by two persons was made by one, on information called off to him by the other. The person making the memorandum was not produced as a witness, the other made no attempt to verify the memorandum. It was properly rejected.

**Same.**

8. Memoranda made by two other persons of an inventory made in similar manner, but checked back and verified in a measure by both, held admissible under facts stated in the opinion, though only one of the persons participating in the inventory was produced as a witness.

Action in replevin in the district court for St. Louis county to recover possession of certain timber and its products or, in case possession could not be obtained, for \$50,000 the value thereof and \$10,000 for its detention. The case was tried before Stanton, J., who denied motions for directed verdicts, and a jury which returned a

verdict that plaintiff was entitled to the possession of the property. From an order denying their motion for a new trial, defendants appealed. Reversed and new trial granted.

*H. L. & J. W. Schmitt*, for appellants.

*Fryberger & Fulton*, for respondent.

HALLAM, J.

This is an action in replevin to recover possession of a quantity of timber products located in the yards of defendant McKinley, at Brainerd, Minnesota. The action was commenced and the property seized under writ of replevin in September, 1908. Plaintiff recovered a verdict. Defendants appeal from an order denying their motion for a new trial.

Replevin is a possessory action, and it was incumbent upon plaintiff to prove its right to immediate possession. Plaintiff's claim is that it had purchased the property in question from defendant McKinley. It claims that, by virtue of the contracts between them, title passed to plaintiff, and, with it, right of possession. There is no claim that plaintiff was entitled to possession if title did not pass by these contracts. This is the first question to be determined.

1. We are of the opinion that under these contracts the title did not pass to plaintiff.

The facts, so far as here important, are as follows:

On October 1, 1906, plaintiff and defendant McKinley entered into a contract, designated Exhibit B, by the terms of which, among other things, defendant McKinley agreed to sell and deliver to plaintiff a quantity of cedar telegraph and telephone poles and also railroad cross ties, at prices fixed therein. Plaintiff agreed to make certain advances as the work progressed. It is conceded that this contract was executory and did not pass title to any of the material contracted for.

McKinley proceeded to carry out this contract. Some of the material he manufactured himself, and some he procured by contracting with others. It soon developed that with his limited capital he could not fulfil his contract without larger advances than the contract called



for. In order that plaintiff might safely make larger advances, another contract was made January 26, 1907, designated Exhibit J.

This provided that:

"The first party (McKinley) in consideration of the premises herein, hereby sells and transfers the title to the second party (plaintiff) of all material that has been manufactured under said contract to date \* \* \* ." This paragraph is unequivocal, but it is not very important here because the material "manufactured under said contract to date" of Exhibit J composed a very small part, if any at all, of the material taken under the writ of replevin. Exhibit J contains the further provision: "The party of the first part further assigns and sells to the party of the second part all interest in all contracts he has of every nature and description for the manufacture and sale of material of the kinds mentioned in said contract. The second party, however, does not assume any obligations with reference to the terms of said contracts except such as it shall deem advisable. Provided delivery of material under any of said contracts with third parties shall be accepted as delivery under the original contract."

This paragraph is the important one. It clearly assigns all contracts McKinley had with third parties for the manufacture of material of the kinds mentioned in Exhibit B, and it operated to transfer to plaintiff the title to all such material as soon as McKinley acquired title to it under such contracts. But this by no means covered plaintiff's case. It would appear that a large part of the material taken under the writ of replevin was gotten out and manufactured or was in process of manufacture by McKinley himself, and, unless the title to this also passed to plaintiff, the present verdict cannot stand.

Plaintiff's contention is that Exhibit J did operate to transfer to plaintiff the title to this material. Plaintiff's argument is that the assignment by McKinley to plaintiff of "all interest in all contracts he has of every nature and description for the manufacture and sale of material of the kinds mentioned in said contract," operated as a transfer by McKinley to plaintiff of Exhibit B, the contract subsisting between themselves, and incidentally as a transfer of title to

all material in process of manufacture under it. We cannot sustain this contention. We know of no principle of law by which one party to a contract can assign his part of the contract to the other party, and still have the contract remain in force. We are cited to no decision of any court that so holds, and we know of none. An assignment of a contract such as this carries with it a right to perform and a right to receive the stipulated price. Plaintiff's contention involves the absurd situation of a party to a contract acquiring the right to perform an obligation due to himself, and to receive from himself the price or compensation which he himself is to pay. It appears to us that the complaint was not drawn on any such theory. But, however this may be, we are quite clear that the contract cannot be so construed.

Plaintiff's right of recovery is predicated solely on the theory that Exhibit J passed title to the material taken in replevin. Since this theory is, in our opinion, untenable, as to at least a large part of the material, the verdict cannot stand.

In view of a new trial, some of the court's rulings upon evidence should be considered.

2. Defendants offered to prove by defendant McKinley the value of the property when it was taken. This evidence was ruled out on the ground that he had not shown himself competent to testify on this subject. This was error. McKinley was the owner of this material. Some of it he had purchased, and some he had manufactured himself. Over objections most persistent and technical, it was made to appear that he had actually participated in getting out the portion manufactured by himself, that he had taken part in getting it out of the woods, in taking it from the river at Brainerd, and in sorting and manufacturing it in the yard, and that he had seen practically every pole of it before it was piled. It appeared from the testimony of Mr. Johnson, plaintiff's president, that at the inception of trouble between them, McKinley and Johnson went together to Brainerd to make as close an estimate of this material as they could, "to see who was right about the money question." Both parties were apparently satisfied that they could make an estimate that would be a guide to themselves. They spent about three weeks at this. The poles were

then in large piles. McKinley testified that they counted the poles and valued the material as they went along. Plaintiff's counsel examined Johnson at length as to this estimate and the amount estimated. Still later this material was loaded out from the Brainerd yard by plaintiff, and while this work was going on McKinley was "on the ground pretty near all the time." He was an experienced timber man and was familiar with values. Clearly he was a competent witness as to the value of this material, and his evidence should have been received. His evidence was probably not a close test of value, in view of the fact that some of the defects to which cedar poles are subject can only be discovered by close inspection, but this fact did not render his evidence wholly valueless. The evidence was competent, and sufficient foundation was laid to require that it be received.

3. The evidence of both McKinley and Johnson showed that they did not complete their estimate of the material in the yard. They disagreed as to what proportion of the material was estimated. Johnson testified that the material estimated amounted to \$35,000 or \$40,000, and that their estimate covered all but about 6,000 pieces. Thereupon defendant offered to prove that the material estimated was no more than half of that in the yard. The offer was rejected. It seems clear that this testimony should have been received.

4. After this property was taken in replevin, its manufacture was completed by plaintiff, and it was then sold by plaintiff to the National Pole Co. Plaintiff gave defendants credit for the amount sold, at contract price, less the cost of manufacture and delivery, which plaintiff claims was about \$12,000. Plaintiff produced evidence that this amount was the reasonable cost thereof. Defendants then offered to prove by defendant McKinley that the reasonable cost of completing the manufacture and delivery of this material did not exceed \$5,000. This was ruled out, on the ground that he was not shown to be competent to testify. McKinley showed himself to be familiar with the cost of manufacture. In view of this fact and of the facts above recited, the evidence should have been received.

5. Defendants offered to prove by McKinley that Johnson, acting as president of plaintiff, stated at a conference at Mankato, before the commencement of the action, that it would cost from \$4,000 to \$5,000 to manufacture and load out the balance of the material according to the terms of the contract. This evidence was rejected. It should have been received. It was an admission of the president of plaintiff corporation while in charge of the business of the corporation to which the admission pertained, and in the course of negotiation of such business. Defendant Hoerr later gave evidence of this same admission. McKinley's evidence was accordingly cumulative, but it should have been received.

6. Plaintiff's books of account were admitted in evidence. They were made up from reports made by inspectors, some of whom were in the employ of plaintiff and some in the employ of the National Pole Co. The reports were produced and were verified on the stand by the persons making them. These reports were transcribed into plaintiff's regular books of account. These books contained also the record of sales of this material and of the cash transactions incident thereto, which are usual in books of account of mercantile transactions. These entries were made in the usual course of business and in the usual manner of books of account, and were amply verified. Plaintiff had kept its books in this manner before this suit was brought, and continued to keep its record of these transactions in the same way, without change after suit brought. The entries, both before and after suit brought, were received in evidence. As far as concerned items based on reports from the National Pole Co.'s inspectors, the books may not have been books of account within the statute (G. S. 1913, § 8437) but they were admissible in evidence under the common-law rules prevailing in this country, and were properly received. *Butler v. Cornwall Iron Co.* 22 Conn. 335; *Chicago & Alton R. Co. v. The American Strawboard Co.* 190 Ill. 268, 60 N. E. 518; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, 12 C. C. A. 129; *Mississippi River Logging Co. v. Robson*, 69 Fed. 773, 16 C. C. A. 400; *Fortier v. Skibo Timber Co.* 111 Minn. 518, 127 N. W. 414. Where entries of this sort are verified by all persons who took any part in making them, they should be received in evidence. The books were properly received.

This case is distinguishable from *Fidelity & Casualty Co. of New York v. Crays*, 76 Minn. 450, 79 N. W. 531; *Union Central Life Ins. Co. v. Prigge*, 90 Minn. 370, 96 N. W. 917, where the entries were made from data received from third persons, without verification.

The fact that some of the entries were made after suit was commenced does not render them inadmissible. See *Fortier v. Skibo Timber Co.* 111 Minn. 518, 127 N. W. 414.

7. Invoices made by defendants after suit brought were offered in evidence by defendants and rejected. One of these was known as Exhibit 32. It was in no sense a book of account. It was simply a memorandum of a count made by two men, Erlandson and Hanoway. Erlandson alone testified. He said that he "counted the stuff and called it off" and that Hanoway "was supposed to mark it up." The witness paid no attention to the memorandum made, because others were supposed to check it up. Certainly this record was properly rejected.

8. Defendants' counsel asked McKinley to testify from an invoice, designated Exhibit 34, the number of pieces in certain piles. Objection was made, and the court sustained the objection, apparently on the ground that the memorandum was not properly authenticated. This was error. Exhibit 34 was a book purporting to be a record of a count made by McKinley and one Marvick. Marvick was not produced as a witness. McKinley described their method of work as follows: Part of the time Marvick counted and called off the figures to McKinley, who put them down. "Mr. Marvick would count ten poles" he said, "then he would give them to me, then he would count ten more and give them to me, and when he would get a hundred he would mark it on the pile and he would go on and count \* \* \*. These piles we took were large piles, with all the way from a thousand to fifteen and sixteen hundred poles in a pile \* \* \*. When we got through with that pile we would count the hundreds in that pile, then checked it up with the count we had on the book to see whether we were correct or not \* \* \*. We didn't count the poles again." Part of the time McKinley counted. He called off the result to Marvick, who put it down in McKinley's presence. McKinley further testified as to this: "I checked them afterwards \* \* \* when I got a hundred poles counted. I

marked it down and he had to have marks in that book in order to correspond with my count when he got through."

As was said in *Seligman v. Estate of Ten Eyck*, 60 Mich. 267, 276, 27 N. W. 514, 517: "From the nature of the business it cannot always be possible to show more than was shown here." See also *Sullivan v. Godkin*, 167 Mich. 663, 133 N. W. 481.

It seems highly desirable that on a new trial the issues be so framed that a full accounting and determination may be had of all matters in controversy between these parties, in order that this single lawsuit, when it is concluded, shall put an end to their litigation.

Order reversed and new trial granted.

On appeal from the clerk's taxation of costs the following opinion was filed on February 3, 1914:

**PER CURIAM.**

The item \$170 for copying exhibits is disallowed. The order settling the case shows that a transcript of these exhibits was incorporated in the settled case. The motion for a new trial was made on this settled case. The expense thereof was a disbursement in the trial court. If further transcripts were made later the expense thereof cannot be taxed.

The item "printer's fees printing paper books, 904 pages at 75c. \$678" is reduced \$122.50, 150 pages of the portions objected to being unnecessary to present any assignment of error made.

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**WILLIAM M. KNIGHT v. CATHERINE MARTIN.<sup>1</sup>**

January 2, 1914.

Nos. 18,268—(160).

**Members of family—liability for services or support.**

1. Where brothers and sisters live together as one family, the presump-

<sup>1</sup> Reported in 144 N. W. 941.

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Note.—The authorities on the question of implication of agreement to pay for services rendered by relative or member of household are discussed in an extensive note in 11 L.R.A.(N.S.) 873.

tion is that no liability exists in favor of one or against another for services performed or support furnished.

**Presumption not conclusive.**

2. Such presumption may be overcome by proof of facts and circumstances from which it is reasonable to infer that both parties understood that compensation should be made for such services.

**Evidence.**

3. Evidence examined and *held* insufficient to overcome such presumption.

**Judgment notwithstanding verdict.**

4. Judgment notwithstanding the verdict can be granted only when a motion for a directed verdict was made at the trial, and a motion to dismiss an appeal from probate court is not equivalent to such motion.

In the probate court for Hennepin county Catherine Martin filed a claim against the estate of Cornelius Martin, deceased, for \$2,700 for services during 9 years. William M. Knight, the administrator of the estate, filed objections to the claim, and it was disallowed. From the order of disallowance, claimant appealed to the district court for Hennepin county. The appeal was heard before Hale, J., who denied respondent's motion to dismiss the appeal, and a jury which returned a verdict in favor of claimant for \$1,440. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, the administrator appealed. Reversed and new trial granted.

*Elmer W. Gray*, for appellant.

*J. L. Murphy* and *Thomas B. Kilbride*, for respondent.

**TAYLOR, C.**

The Martin family consisting of the father, mother and nine children, lived upon a farm of 96 acres near Robbinsdale in Hennepin county. About 1880 the mother died, and thereafter the daughter, Catherine, then about 15 years of age, assumed and performed the duties of housekeeper. As the children grew up they all left home excepting Catherine, her twin sister Helen, and her brother Cornelius. The father and these three remained upon the farm and continued to live together as one family until the death of the father

in 1902. Catherine at all times performed the duties of housekeeper, and, during the latter years of the father's lifetime, Cornelius took charge of and operated the farm. Prior to his death, the father conveyed to Cornelius 42 acres of the farm, including the farm buildings, and to Catherine and Helen the remaining 54 acres thereof. After the death of the father, Cornelius, Catherine and Helen continued to live together upon the farm as one family, the same as before, until the death of Cornelius eight years later. Catherine managed and conducted the household affairs, and Cornelius managed and operated the farm—that part of it belonging to his sisters, as well as that part of it belonging to himself—the same as they had done before the father's death. Helen was an invalid for some years and was cared for by Catherine and Cornelius. From the proceeds of the farm, Cornelius paid the taxes upon all the property, the household expenses, and the doctor and hospital bills for Helen. He supplied Helen's wants and gave her some money, but never gave Catherine any money nor purchased any clothing for her. Catherine, however, sold the chickens, eggs and butter, and had the money received therefor, and out of this purchased her own clothing.

The evidence indicates that these three considered and treated the property as belonging to them in common; and that Cornelius intended that so much of it as belonged to him should go to these two sisters when he should pass away, but he did nothing to put this intention into effect and died intestate. After his death Catherine filed a claim against his estate for services as housekeeper which was disallowed by the probate court. She appealed to the district court where the case was tried before a jury and a verdict rendered in her favor. Thereafter the administrator made an alternative motion for judgment notwithstanding the verdict or for a new trial, which was denied, and thereupon he appealed to this court.

Where brothers and sisters live together as one family, the presumption is that no liability exists in favor of one or against another for services performed or support furnished. *Hodge v. Hodge*, 11 L.R.A.(N.S.) 873, and the exhaustive note appended thereto [47 Wash. 196, 91 Pac. 764]; *Baxter v. Gale*, 74 Minn. 36, 76 N. W. 954; *McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589; *Einolf*



v. Thomson, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 290, 547. "This presumption may, however, be overcome by proof of an express agreement to pay for such services, or of such facts and circumstances from which it reasonably may be inferred that it was understood and expected by both parties that pecuniary compensation should be made for the services." *Begin v. Begin*, 98 Minn. 122, 107 N. W. 149.

The question for determination is whether there is any evidence from which an agreement or understanding that Cornelius should compensate Catherine for her services may be inferred. The facts above mentioned are uncontroverted and in addition thereto the only evidence claimed to have any bearing upon the question is the following:

Catherine, asked by her counsel whether, when she was keeping house for Cornelius, she intended to do it for nothing, answered: "No sir. I always thought I would get something out of it." The witness Chapin testified that in response to a complaint by Catherine that she was receiving nothing for her labor, Cornelius replied: "I don't expect you are working for nothing; whatever is mine is yours;" and that Cornelius subsequently stated to witness that he would never see the girls want for anything as long as he had a dollar. The witness Sayre testified that Catherine asked Cornelius, at one time, if she might take a horse to drive to Robbinsdale, and that Cornelius replied "that she could have anything that she wanted, that whatever was his was hers, and whatever horse she wanted, to take;" and that in response to an inquiry by witness, at another time, as to why he did not buy more land, Cornelius replied "that he had stayed on the old homestead all his life and him and the girls were there, and that that was all that he felt like handling, and after he passed away that he wanted it to go to the girls and they could do with it to suit themselves."

The presumption cannot be overcome by such evidence as this. No inference that Cornelius understood or expected that he was to pay Catherine for her services can reasonably be drawn therefrom. It does not point toward any express or implied contract to that effect. To permit the presumption to be overborne by such vague

and casual remarks would result in its practical abrogation, for the cases would be exceedingly rare in which remarks indicating a common interest in the property and an intention to confer favors upon other members of the family could not be shown.

That it might have been fitting for Cornelius to have left his property to these two sisters, will not justify the court in allowing them a portion thereof through the medium of a claim for services, when no agreement to render compensation for such services has been established.

Judgment notwithstanding the verdict can be granted only when a motion for a directed verdict was made at the trial. Section 4362, R. L. 1905. *Hemstad v. Hall*, 64 Minn. 136, 66 N. W. 366; *Netzer v. City of Crookston*, 66 Minn. 355, 68 N. W. 1099; *Sayer v. Harris Produce Co.* 84 Minn. 216, 87 N. W. 617.

At the conclusion of the claimant's evidence the administrator made a motion to dismiss the appeal which was denied. He then rested without offering any evidence but made no further motion. The motion to dismiss the appeal was not equivalent to a motion for a directed verdict, and it follows that the refusal of the trial court to grant judgment notwithstanding the verdict was correct. But the motion for a new trial should have been granted upon the ground that the evidence was not sufficient to sustain the verdict.

Order denying a new trial reversed and a new trial granted.

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## ETHEL S. BOND v. PENNSYLVANIA RAILROAD COMPANY.<sup>1</sup>

January 2, 1914.

Nos. 18,269—(150).

### **Jurisdiction of court—judicial notice.**

1. The court takes judicial notice of the proceedings by which it acquires jurisdiction.

<sup>1</sup> Reported in 144 N. W. 942.

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Note.—The question of conflict of laws as to action for death or bodily in-

**Limitation of action—death from wrongful act in foreign state.**

2. An action for damages for a death resulting from a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the statutes of such state.

**Action upon foreign statute—procedure governed by *lex fori*.**

3. The time at which such action is deemed as commenced and all other matters pertaining to procedure are determined and governed exclusively by the law of the forum.

**Limitation of action—construction of statute.**

4. The provisions of the code relating to the commencement of actions must be construed as a whole and so as to give effect to the intention to provide a single uniform course of procedure which shall apply alike to all civil actions.

**Commencement of action.**

5. An action is deemed as commenced when the summons is delivered to the proper officer for service, if such service be completed within the prescribed time.

Action in the district court for Hennepin county under statutes of Pennsylvania, approved April 15, 1851, and April 26, 1855, respectively, to recover \$25,000 for the death of plaintiff's husband on December 6, 1911. The answer alleged that the cause of action did not accrue within one year prior to the time when the action was brought, that the action was not brought within one year after the death of decedent, and was barred by the express provisions of the statutes of Pennsylvania. The reply alleged that the action was in fact commenced within one year after the death of decedent and was begun by filing the summons and complaint in the office of the clerk of court on November 23, 1912, and delivery of the same on that day to the sheriff of the county of Hennepin for service upon defendant, and the attachment of property in the state belonging to defendant by garnishment process of upwards of \$20,000, and after compliance by plaintiff with the statutory prerequisites to personal service upon defendant in the state of Penn-

sylvania, is treated in a note in 56 L.R.A. 193. And as to what statute of limitations will govern as to action for death, see notes in 48 L.R.A. 638 and 56 L.R.A. 208.

sylvania in such case provided, plaintiff caused a copy of the summons and complaint to be served upon defendant personally at the city of Philadelphia on December 20, 1912. From an order, Dickinson, J., overruling its demurrer to the reply, defendant appealed. Affirmed.

*Durment, Moore & Oppenheimer and Thomas DeWitt Cuyler,* for appellant.

*Usher L. Burdick, John J. Murphy and Stiles & Devaney,* for respondent.

TAYLOR, C.

Plaintiff's husband was killed in a railroad wreck in the state of Pennsylvania, on December 5, 1911, while a passenger upon one of defendant's trains. Plaintiff brought suit for damages in the district court of Hennepin county, and, in her complaint, set forth the Pennsylvania statute authorizing such actions. This statute contains the following limitation: "The action shall be brought within one year after the death, and not thereafter." Defendant answered and among other things alleged that the action was not brought within one year after the death of the passenger and was barred by the statute. The summons and complaint were placed in the hands of the sheriff of Hennepin county for service, and, on November 23, 1912, he duly returned that the defendant could not be found, and, on the same date, the summons and complaint with this return attached thereto were filed in the office of the clerk of the district court. On the same date a large amount of money belonging to defendant was impounded by garnishment proceedings issued in the action. On November 30, 1912, the affidavit required by statute to authorize constructive service upon a nonresident was filed, and on December 20, 1912, the summons and complaint were served upon defendant personally in the state of Pennsylvania. In her reply to the answer of defendant, plaintiff set forth these proceedings to show that the action was begun within the statutory time. Defendant demurred to the reply, the demurrer was overruled, and defendant appealed.

The proceedings by which jurisdiction was acquired are a part of

the record in the case, and it was not necessary to set them forth in the reply to have the court take notice of them. As it was not necessary to allege in the reply that these proceedings had been taken, defendant's point that, as to a portion of them, the reply merely states a conclusion of law, is without force. While the practice, adopted in this case, of setting forth in a pleading the proceedings by which jurisdiction was acquired and then demurring to such pleading is unusual, a demurrer searches the record, and we will consider whether it appears from the complaint, in connection with the record, that the right of action was barred at the time the suit was begun.

An action brought in this state to recover damages for the death of a person caused by a wrongful act committed in another state, is based upon the statute of the state in which the cause of action arose; and the time within which such action may be brought is the time prescribed by such statute, and not the time prescribed by our own statutes. *Negaubauer v. Great Northern Ry. Co.* 92 Minn. 184, 99 N. W. 620, 104 Am. St. 674, 2 Ann. Cas. 150; *Stewart v. Great Northern Ry. Co.* 103 Minn. 156, 114 N. W. 953, 123 Am. St. 318; *Casey v. American Bridge Co.* 116 Minn. 461, 134 N. W. 111, 38 L.R.A.(N.S.) 521. But the means by which our courts acquire jurisdiction, and the time at which the action is deemed as commenced, and all other matters pertaining to the procedure and to the remedy are determined and governed exclusively by our own statutes. *Fryklund v. Great Northern Ry. Co.* 101 Minn. 37, 111 N. W. 727; *Brunette v. Minneapolis, St. P. & S. S. M. Ry. Co.* 118 Minn. 444, 137 N. W. 172; *Herrick v. Minneapolis & St. L. Ry. Co.* 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; *Wendell v. Lebon*, 30 Minn. 234, 15 N. W. 109; *First National Bank of Deadwood v. Gustin M. C. M. Co.* 42 Minn. 327, 44 N. W. 198, 6 L.R.A. 676, 18 Am. St. 510; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. ed. 104; *Pope v. Terre Haute C. M. Co.* 87 N. Y. 139.

Defendant is a foreign corporation and only a constructive service of the summons could be made upon it. Such service was made. If the suit was commenced when the summons and complaint were placed in the hands of the sheriff, the action was brought within the statutory time. If it was not commenced until the constructive serv-

ice had been completed by the service made upon the defendant in the state of Pennsylvania, it was not brought within the prescribed time and the right of action was barred by the statute.

Chapter 66 of the general statutes of 1866, as amended from time to time, is the code of civil procedure of the state of Minnesota and appears as chapter 77 of the revised laws of 1905. The first section of this code provides: "There shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs." Since the adoption of this code we have had but one form of action called a "civil action," and but one method of procedure which applies alike to all such actions. *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637; *Palmer v. Yorks*, 77 Minn. 20, 79 N. W. 587; *Gilbert v. Boak Fish Co.* 86 Minn. 365, 90 N. W. 767, 58 L.R.A. 735. Such actions "shall be commenced by the service of a summons as hereinafter provided." Section 4102, R. L. 1905. There is no other way of commencing a civil action in this state, and the form of the summons and the manner of its service in all such actions is governed by this code. *Crombie v. Little*, 47 Minn. 581, 50 N. W. 823; *H. L. Spencer Co. v. Koell*, 91 Minn. 226, 97 N. W. 974. While there are statutes authorizing various special proceedings and prescribing the manner in which such proceedings shall be instituted and conducted, such statutes apply only to such special proceedings. Actions for damages, whether based upon our own statutes or upon those of other states, are governed by and must be brought and prosecuted under and as provided in the code of civil procedure.

The court has jurisdiction of the defendant from the time of the service of the summons. Section 54, chapter 66, G. S. 1866. Section 4115, R. L. 1905. But in case of constructive service the court does not acquire jurisdiction until such constructive service is completed. *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816.

Sections 13 and 14, chapter 66, G. S. 1866, are as follows:

Section 13: "An action is commenced as to each defendant, when the summons is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him, and is deemed to be pending from the time of its commencement, until its final de-

termination upon appeal, or until the time for an appeal has passed, and the judgment has been satisfied."

Section 14: "An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this chapter, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation is a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business; but such an attempt shall be followed by the first publication of the summons, or the service thereof, within sixty days."

These two sections remained unchanged until the revision of 1905. In that revision they were combined into one section which reads as follows:

"For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served upon him, or on a codefendant who is a joint contractor or otherwise united in interest with him, or is delivered to the proper officer for such service; but, as against any defendant not served within the period of limitation, such delivery shall be ineffectual, unless within sixty days thereafter the summons be actually served on him or the first publication thereof be made. And when an action is begun it shall be deemed pending until the final judgment therein has been satisfied." Section 4081, R. L. 1905.

In the revision of the laws made in 1866, the several chapters were enacted as separate acts. The sections were numbered by chapters and each chapter was subdivided into various "Titles." Chapter 66 was subdivided into twenty-four "Titles." Sections 13 and 14, quoted above, are found under "Title II," which bears the sub-heading: "The Time of Commencing Actions." The general statutes limiting the time within which actions may be brought are also found under "Title II." But the provision in section 14 that "an attempt to commence an action is deemed equivalent to the commencement thereof, *within the meaning of this chapter,*" precludes

limiting the operation of this section to that portion of the chapter contained in "Title II." When the prescribed steps have been taken, all actions brought under the code are deemed as commenced, not merely within the meaning of the limitations contained in title II, but within the meaning of all the provisions of the chapter. The provisions of the code in reference to the commencement of actions, the service of the summons, and the acquiring of jurisdiction were intended to form a complete and harmonious whole and to apply to and govern all civil actions. The various provisions must be construed together and so as to give effect to such intention. *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816; *Knight v. Norris*, 13 Minn. 438, 444, (473); *In re St. Paul & N. P. Ry. Co.* 37 Minn. 164, 33 N. W. 701; *State v. McDonald*, 26 Minn. 445, 1 N. W. 832; *Brown v. Village of Heron Lake*, 67 Minn. 146, 69 N. W. 710; *Hunt v. Grant*, 87 Minn. 189, 91 N. W. 485; *Murtaugh v. Chicago, M. & St. P. Ry. Co.* 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609; *Webster Mnfg. Co. v. Penrod*, 103 Minn. 69, 114 N. W. 257; *State v. Reusswig*, 110 Minn. 473, 126 N. W. 279; *State v. Schmidt*, 111 Minn. 180, 126 N. W. 487; *Downing v. Lucy*, 121 Minn. 301, 141 N. W. 183.

The action is commenced by the service of a summons. It is deemed commenced as to each defendant when the summons is served upon him or upon a co-defendant united in interest with him, or when it is placed in the hands of the proper officer for such service, if this be followed by actual or constructive service within the prescribed time. The court, however, does not acquire jurisdiction until the service is completed.

Whatever uncertainty may have resulted from sections 13, 14, 42, 49, and 54, chapter 66, G. S. 1866, in the case of a nonresident who had never had a place of residence nor a place of business within the state, was removed in the revision of 1905, which provides that the action shall be considered as begun when the summons "is delivered to the proper officer" for service. Section 4081, R. L. 1905. The proper officer is the officer who in the particular case is the proper official to make such service. In the case of nonresidents



such officer is the sheriff of the county in which the action is begun. Section 4111, R. L. 1905.

Defendant contends, however, that as section 4081, R. L. 1905, reads: "For the purposes of this subdivision, an action shall be considered as begun against each defendant when the summons is served upon him \* \* \* or is delivered to the proper officer for such service," it follows from the phrase, "for the purposes of this subdivision," that the action is deemed as begun only within the meaning of those provisions of chapter 77, R. L. 1905, appearing under the headline, "Limitation of Actions," as this section is among those appearing under that headline. We do not concur in this conclusion.

Unlike the revision of 1866, in which the several chapters were enacted separately, the revision of 1905 was presented for adoption as a single act and was enacted as an entirety. The titles into which the various chapters had previously been subdivided were eliminated and the sections were numbered consecutively throughout the entire act. The laws as revised were divided into 5 parts and were subdivided into 108 chapters. The act did not subdivide the chapters except into sections, but provision was made for inserting appropriate headlines. In accordance with this provision topical headlines were prefixed to each section, and in addition thereto other topical headlines were inserted at appropriate places throughout the act. The commissioner charged with the duty of editing the act for the printer was authorized "to change headlines; to insert, alter or omit subheads." Section 3, chapter 218, Laws 1905. The headlines are not a part of the act and were inserted merely as a matter of convenience. We cannot hold that the expression "for the purposes of this subdivision," found in section 4081, limits the provisions of section 4081 to those sections of the act which the editor might thereafter see fit to group with this section under some common headline. The subdivision referred to must be a subdivision of the act itself or that subdivision of the subject-matter of the act to which the section relates. The subdivision of the revised laws in which the section is found is chapter 77, which is the code of civil procedure; and the subject-matter to which it relates is the bringing

of civil actions and the time at which they shall be deemed to have been begun.

Construing the section as applying to all actions brought under chapter 77 gives it the same application which it had under the prior laws, and provides one uniform rule for determining the time at which a civil action is begun. The various provisions of the code considered as a whole clearly indicate that the purpose was to provide simple, uniform rules which should apply to all civil actions so far as procedure was concerned, and the construction we give section 4081 is in accord with such purpose and in harmony with the other sections relating to the same subject-matter. There is no good reason why what constitutes the commencement of one civil action should not constitute the commencement of another; no good reason why what constitutes the commencement of an action to recover damages for personal injuries should not also constitute the commencement of an action to recover damages for an injury which results in death. And we discover no intention to make a distinction between them as to what shall constitute the commencement of the action. The summons and complaint in the case at bar having been delivered to the sheriff for service within the year, and such service having been completed within the time prescribed by the statute, the action was commenced within the time limited therefor by the Pennsylvania statute.

The suggestion of counsel that, if section 4081 applies to the instant case, then section 4082 also applies is a clear *non sequitur*. The latter section provides that, in determining whether our statute of limitations has run, the time during which the defendant resides out of the state shall not be counted. As already stated our statute of limitations has no application whatever to the case at bar, and the time within which the action must be commenced is governed solely by the statute of Pennsylvania which both gave the right of action and limited the time within which such right could be enforced. But the manner of bringing the action in the courts of Minnesota and what constituted the commencement thereof is governed by the statutes of Minnesota.

Order affirmed.

NELSON ERNEST TUTTLE v. FARMER'S HANDY  
WAGON COMPANY.<sup>1</sup>

January 2, 1914.

Nos. 18,277—(151).

**Servant not "loaned"—negligence of servant.**

1. Defendant Clow purchased a silo from defendant, the Farmer's Handy Wagon Co., under a contract whereby the company agreed to furnish a man to superintend its erection. In accordance with the contract such superintendent was furnished by the company, and the other workmen including plaintiff were furnished by Clow. Through the alleged negligence of the superintendent plaintiff sustained injuries. *Held:*

(1) Whether the injuries resulted from negligence on the part of the superintendent was a question for the jury.

(2) That the superintendent had not been "loaned" to Clow but remained the servant of the company and hence was not a fellow servant of plaintiff.

**Peremptory challenges.**

2. Limiting the number of peremptory challenges to three for both defendants, even if erroneous, does not entitle appellant to a reversal, unless it appear that appellant was not permitted to exercise all three challenges and that some juror remained upon the panel whom appellant wished to exclude therefrom.

Action transferred to the district court for Ramsey county by the minor plaintiff, by his guardian ad litem, against the Farmer's Handy Wagon Co. and Willard B. Clow, to recover \$40,000 for injuries received while in the employ of defendant Clow.

The amended complaint alleged that plaintiff was employed by defendant Clow to work at common labor, that defendant company

<sup>1</sup> Reported in 144 N. W. 938.

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Note.—As to which of two or more persons is master of third, see elaborate note in 37 L.R.A. 33. And upon the statutory liability of employers for the negligence of superintendents while participating in the work, generally, see notes in 58 L.R.A. 47; 16 L.R.A.(N.S.) 146; and 21 L.R.A.(N.S.) 601.

knew of that fact; that thereafter he was ordered by defendant Clow to work under the orders of defendant company upon the construction of the silo mentioned in the opinion; that defendant company was negligent in doing all of the work with great and unusual haste; that it negligently failed to adopt a reasonably safe method in elevating the piece of material mentioned from the ground to the staging; that it failed to use proper means for preventing the iron from striking the plank and raised the iron in such a careless manner that the same was thereby caused to strike the projecting end of the plank, by reason of which negligent acts the plaintiff was injured. The separate answer of defendant company alleged that defendant Clow furnished all labor, material and appliances used in the erection of the silo, except the man to superintend its erection furnished by defendant company and an assistant also furnished by it, and the answering defendant did not supply any labor, material or appliances used in the erection except the man and his assistant. The answer also alleged that plaintiff was injured by his own negligence to exercise ordinary care for his own safety, and that plaintiff and the others engaged in erecting the scaffold were fellow servants of plaintiff.

The case was tried before Dickson, J., who denied the motions of defendant company to dismiss the action as to it, and for a directed verdict, and a jury which returned a verdict for \$7,000 in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant company appealed. Affirmed.

*Charles Burke Elliott, A. X. Schall, Jr., and Hosmer A. Brown,* for appellant.

*Larrabee & Davies,* for respondent.

TAYLOR, C.

While assisting in the erection of a silo purchased by defendant Clow from defendant the Farmer's Handy Wagon Co. plaintiff fell from a platform near the top of the silo and sustained serious injuries. He brought suit for damages against both defendants, but recovered a verdict against defendant company only. The usual alter-

native motion for judgment notwithstanding the verdict or for a new trial was made and denied, and defendant company appealed.

Defendant Clow gave defendant the Farmer's Handy Wagon Co. an order for a silo to be shipped to Pillager, Minnesota. The company accepted the order and as a part of the contract agreed to furnish a man to superintend the erection of the silo. The contract specified the size and material of the silo and contemplated that it would be shipped to Clow in a "knocked down" condition. It was shipped to Pillager as ordered, and Clow hauled it from that place to his farm and constructed a concrete foundation for it. The company sent the witness, McNown, to superintend its erection. Clow was not at the farm when McNown arrived, nor at any time during the erection of the silo, but the witness Pennington, his foreman upon the farm, acted for him. At his arrival, McNown called upon Pennington to furnish the men necessary to do the work, and Pennington thereupon hired plaintiff and several others for that purpose. McNown was paid for his services by the company, but all the other employees were paid by Clow. McNown took full charge and control of the work. The silo was cylindrical in form, 16 feet in diameter and 32 feet high, and made of staves held in place by iron bands or hoops. After the circular wall was in position, a staging or platform was constructed inside and about 20 inches below the top of the wall for the workmen to stand upon. A plank used while driving the staves into place lay across the top of the silo, nearly at a right angle with the platform, with one end resting upon the wall and the other end projecting two or three feet outside the opposite wall. McNown, plaintiff and the witness Koch were upon the platform for the purpose of placing a hoop in position. While McNown was raising a segment of the hoop, 12 or 15 feet in length, from the ground to the top of the silo by means of a rope attached to it, the plank lying across the top of the silo became displaced and fell in such a way as to precipitate plaintiff from the platform to the ground. He fell a distance of over 30 feet, and sustained severe injuries.

1. Plaintiff bases his right to recover upon the charge that McNown caused the plank to fall by negligently pulling the segment of hoop against the projecting end of it. There is testimony that the

hoop struck the plank and other testimony that it did not. The evidence made the question of negligence a question for the jury. It was properly submitted to them and there is no sufficient ground for this court to overrule their conclusion.

2. The trial court held as a matter of law that McNown was a servant of defendant company, and plaintiff of defendant Clow. Whether the court was correct in so holding is the decisive question in the case.

Appellant contends that it did not undertake to erect the silo and merely loaned McNown to Clow; that Clow was erecting the silo, and that all the employees engaged in the work of erection, including McNown, were his servants. If this be true—if McNown and plaintiff were fellow servants—plaintiff cannot recover. This is conceded. That an employer may loan his servant to another, and that the servant so loaned, while engaged in the business for which he is loaned, is a fellow servant of the other employees engaged in such business is amply sustained by the authorities cited by appellant. *Kelly v. Tyra*, 103 Minn. 176, 114 N. W. 750, 115 N. W. 636, 17 L.R.A.(N.S.) 334; *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L.R.A. 114, 102 Am. St. 328; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. ed. 480; *Forsha v. Nebraska Moline Plow Co.* 89 Neb. 770, 132 N. W. 384; *Higgins v. Western Union Tel. Co.* 156 N. Y. 75, 50 N. E. 500, 66 Am. St. 537; *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145, 60 N. E. 87; *Westover v. Hoover*, 88 Neb. 201, 129 N. W. 285. But we think that McNown had not been loaned to Clow but remained the servant of the company. While the company had not agreed to erect the silo, it had agreed as a part of the contract of sale to furnish a man to superintend its erection. By the terms of the contract Clow had relieved himself from the responsibility of superintending the work of erection, and had imposed that responsibility upon the company. Under the contract, the man to superintend the work was to be selected and paid by the company. Clow had no voice in his selection and was not given any control over him. The company sent McNown to perform the duties which by its contract it had agreed to furnish a man to perform. He was not directed to report to Clow for

orders, nor to perform such duties as might be assigned him by Clow, but was sent to take charge of and direct the work, for the purpose of fulfilling the obligation assumed by the company. So far as appears, he acted wholly under and pursuant to the instructions of the company. He did not place himself under the orders of Clow, and Clow made no attempt to exercise control over him. Instead of reporting to Clow for orders, he required Clow's representative to furnish such workmen and such material as he directed. In compliance with his demand, Clow employed plaintiff and several other workmen to perform that portion of the work which under the contract devolved upon Clow. Assuming to act as the representative of the company, McNown took entire control of the work and of the workmen furnished by Clow at his request.

It seems clear that he was not only an employee of the company, but also engaged in the business of the company, while performing the duties assigned him by the company in respect to the erection of this silo. If a servant be loaned by one employer to another, the servant, for the time being, and for the purpose designated, must cease to be a servant of the one and become the servant of the other. For the time being and for the purpose designated, he must be engaged in furthering the business of the master to whom he is loaned, and not in furthering the business of the master who loans him. The right to control and direct him in the performance of his duties, including the right to dispense with his services, must pass from the one to the other. Such was not the fact in respect to McNown.

Under the rule stated in the cases above cited, we think the court was correct in holding that McNown was the servant of the company, and that plaintiff was the servant of Clow, at the time of the accident.

3. The defendants answered separately by different attorneys and at the opening of the trial requested that each be allowed three peremptory challenges to jurors. The court directed the defendants to join in the peremptory challenges and limited the number to three for both. This is assigned as error. The statute provides: "If there be more than one party on a side, they shall join in any challenge made." [R. L. 1905, § 4170] It is insisted that the interests

of the defendants were antagonistic and that each constituted a "side." We do not feel called upon to decide the question sought to be raised. After the jury had been selected and accepted, counsel stated: "I want the record to show that we desire to strike more than the three jurors peremptorily." The court suggested that he make a motion, to which he responded: "I simply want the record, that is all. \* \* \* If there is any question about it, I want the record to show the fact that we want to strike more and are deprived of doing so by the ruling;" to which the court replied: "Well that is a fact, you are." Thereupon counsel for plaintiff announced that plaintiff was willing for the jurors to be recalled and for defendants to strike three more, to which counsel for appellant responded: "We rest on the record as made;" and the court added: "I will adhere to the ruling." This colloquy did not take place until after the empaneling of the jury had been completed.

Assuming but not conceding that the ruling was erroneous, it does not appear that any juror upon the panel was objectionable to defendants. No such claim was made at any time. No juror was pointed out that they desired to exclude. They did not present any name and request that it be stricken from the panel. They did not assent to the proposition that the jurors be recalled to permit them to strike additional names, but rested "on the record as made." They merely asserted that each defendant had the absolute right to exercise three peremptory challenges, without taking any steps to make it appear that they wished to exclude any particular juror then on the panel, or that the panel contained any juror to whom they objected. It is apparently simply a moot question. Furthermore three peremptory challenges were allowed. In the colloquy above referred to counsel stated that defendants had not jointly stricken the three names, but did not state by whom they were in fact stricken; and the record does not disclose by whom they were in fact stricken. For aught that appears all three peremptory challenges may have been exercised by appellant alone.

That a rule of procedure may have been violated is not a sufficient ground for reversing a trial, unless prejudice resulted therefrom to the party complaining, and we think that appellant is not in a posi-



tion, upon this record, to insist that it was prejudiced by the refusal to allow additional challenges.

4. There is no sufficient evidence to substantiate the claim that the jury were chargeable with misconduct in respect to the manner in which they arrived at the amount of the verdict. Neither do any prejudicial errors appear in the rulings or charge of the court.

Order affirmed.

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JOHN P. GALBRAITH v. ELIZA V. WOOD and Another.<sup>1</sup>

January 2, 1914.

Nos. 18,285—(143).

**Lease—advance payment of rent—bankruptcy of lessee.**

In a proposal to take a 15-year lease of a hotel, the lessee offered to pay the lessor the sum of \$20,000 as an advance payment on rent, and agreed to keep such advance good during the first five years of the term, with the privilege of reducing at the rate of \$6,666.66 per year for the third, fourth and fifth years of the term. The proposal was accepted, the advance payment made, and the lease executed. Within six months after the lessee went into possession, the lessor terminated the lease because the tenant had been adjudged a bankrupt, as she had the right to do under the terms of the lease.

It is *held*:

(1) On the pleadings and evidence, the \$20,000 was not paid as security, or as a bonus or independent consideration for the lease, but such payment was made as an advance payment of rent to become due for the third, fourth and fifth years of the term.

(2) Upon the bankruptcy of the lessee, the lessor had the right to terminate the lease and enter the premises, but no right to re-enter without terminating the lease.

(3) Upon the termination of a lease for conditions broken, the lessor is entitled to rent which had previously become due, but not, in the absence of an express agreement, entitled to recover rent subsequently to become due.

<sup>1</sup> Reported in 144 N. W. 945.

(4) Where rent has been paid in advance, under an agreement that it shall be so paid, and the lessor re-enters for conditions broken, he is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent is paid.

(5) A stipulation in the lease that a re-entry by the lessor for conditions broken shall not work a forfeiture of the rent due or to become due is not invalid because providing a penalty for the lessee's breach of conditions.

(6) In this case, the lessee or his trustee in bankruptcy is not entitled to recover of the lessor any part of the advance payment so made.

Action in the district court for Hennepin county by the trustee in bankruptcy of George R. Kibbee, bankrupt, to recover \$18,444.46 rent paid in advance under a certain lease. The case was tried before Molyneaux, J., who dismissed the action. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

*Morphy, Ewing & Bradford*, for appellant.

*Kerr, Fowler, Ware & Furber and Cohen, Atwater & Shaw*, for respondents.

BUNN, J.

Defendants were the owners of the West Hotel, Minneapolis, together with the furniture and fixtures. In August, 1911, George R. Kibbe, of St. Paul, opened negotiations for a lease thereof. On August 31, Kibbe made a proposition in writing to defendants, offering to take a lease of the property for the term of 15 years from September 1, 1911, "upon the terms and conditions hereinafter stated, and in the form of the lease hereto attached \* \* \* and made a part hereof." After stating that defendants were to expend for alterations and repairs not less than \$100,000 nor more than \$150,000, and that Kibbe was to pay as rent the sum of \$40,000 for the first year, \$42,500 for the second year, \$47,500 for the third year, \$50,000 for the fourth year, \$55,000 for the fifth year, and \$60,000 for each of the ten years thereafter, Kibbe proposed as follows:

"4. At the time of the execution of said lease I will pay you the sum of twenty thousand (\$20,000) dollars as an advance payment on rent, which advance I will keep good during the first five (5) years

of said lease, with privilege of reducing at the rate of six thousand six hundred and sixty-six dollars and sixty-six cents (\$6,666.66) per year for the third (3), fourth (4) and fifth (5) year of said term."

The proposition was accepted by defendants September 2, 1911. The lease, dated September 1, was executed September 28. On September 29 Kibbe paid to defendants \$20,000, and they gave him the following receipt therefor:

"Received of George R. Kibbe Twenty Thousand Dollars and no/100 as advance payment on rent of West Hotel according to proposal for lease of West Hotel. Dated August 31, 1911."

Kibbe went into possession of the hotel under the lease about September 1. The lease provided that the rent should be paid in equal monthly instalments in advance on the first day of each month of the term. Kibbe made these monthly payments to and including the month of February, 1912, and remained in possession until March 12, 1912. On that day he was declared bankrupt in voluntary bankruptcy proceedings, and plaintiff was appointed receiver and took possession of the leased premises. On the fourteenth, plaintiff was appointed trustee of the bankrupt estate. On the same day defendants caused to be served upon Kibbe and the plaintiff a notice that they declared the term of the lease ended, as under the conditions of the lease they had the right to do, because Kibbe had been adjudged a bankrupt. Plaintiff thereupon surrendered the leased premises and defendants took possession thereof.

This action was brought by plaintiff, as trustee in bankruptcy of Kibbe, to recover of defendants the \$20,000 paid by Kibbe to them pursuant to his proposition, as hereinbefore stated, less the rent for that part of March during which Kibbe or plaintiff was in possession of the premises. The complaint alleged that the \$20,000 was paid by Kibbe to defendants "as an advance payment of rent;" that Kibbe had kept this advance payment good at all times; that at the time defendants declared the lease terminated and re-entered the premises, they had in their possession "the said advance payment" of \$20,000, and that there then became due to Kibbe, and to the plaintiff as his trustee in bankruptcy, the sum of \$20,000. The complaint contained appropriate allegations of demand and refusal to pay, and

asked judgment for \$18,444.46, with interest from March 14, 1912. The lease and the notice of cancelation were attached as exhibits.

The answer contained a general denial. It admitted the lease, the writing in which Kibbe agreed to advance the \$20,000, the notice of cancelation, the surrender of possession to defendants, and the payment of rent up to the end of February. It contained the following allegation in regard to the \$20,000 payment:

"Defendants further allege that if any moneys were paid by said Kibbe to these defendants as an advance payment on rent, the same were paid under an agreement between these defendants and said Kibbe that all moneys so paid should be and were paid as advance payment for and on account of the rentals and moneys to be paid by said Kibbe under the terms and conditions of said lease, and under the further agreement that the same should be by said Kibbe kept good, and should remain and be in possession of these defendants *as a guaranty of and for the payment to be made to these* defendants by said Kibbe during the first five years of said lease, with the privilege to him of reducing at the rate of \$6,666.66 per year for the third, fourth and fifth years of the term of said lease."

The answer alleged several other defenses and offsets, none of which is material on this appeal.

At the trial, which was by the court without a jury, plaintiff proved the receipt by defendants of the \$20,000 and, on this evidence and the admissions in the pleadings, rested. Defendants moved to dismiss on the ground that the \$20,000 was paid as advance rent and was forfeited when the lease was canceled, and that plaintiff had no right to recover it back. The trial court sustained this position, and granted the motion. A new trial was denied and plaintiff appealed.

Plaintiff claims that the money was paid by Kibbe to defendants as a guaranty or security for the payment of rent. Defendant claims that it was paid as a bonus or an inducement to defendants to make the lease. If either of these claims found support in the pleadings or evidence, the decision of the case would present but little difficulty. If the money was deposited as security for the payment by Kibbe of the rent, it would be reasonably clear that, upon the termination of

the lease, Kibbe, or the plaintiff as the trustee in bankruptcy of his estate, would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination. *Scott v. Montells*, 50 N. Y. Super. Ct. 448, Id. 109 N. Y. 1, 15 N. E. 729; *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Michaels v. Fishel*, 169 N. Y. 381, 62 N. E. 425; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58. If the \$20,000 was paid by Kibbe as a bonus, as an independent consideration to induce defendants to make the lease, it is equally clear that a cancelation of the lease by the landlord, for any cause which justifies the act, would not entitle Kibbe or plaintiff to receive back any part of the sum so paid.

But the question is not so easily solved. There is an absolute lack of anything in the pleadings or the evidence to support defendants' claim that the money was paid as a bonus or an independent consideration to induce them to make the lease. And we feel obliged to hold that the claim of plaintiff that the money was deposited as security is not sustained by the pleadings or the evidence. The complaint distinctly alleges that the \$20,000 was paid by Kibbe to defendants "as an advance payment of rent," and refers to "this advance payment," and "the said advance payment" whenever the pleader has occasion to mention the payment. Nowhere in the complaint is there any suggestion of an allegation that the \$20,000 was deposited with defendants as security. Only in the answer does any suggestion of "security" or "guaranty" appear. The allegations of the answer in this respect we have already quoted. They were denied in the reply, and clearly furnish no basis for a claim by plaintiff that the money was not paid as an advance payment of rent, but as security. There was no evidence as to the purpose for which the \$20,000 was paid and received other than the written proposal of Kibbe and the receipt for the money. The proposal clearly states "I will pay you the sum of \$20,000 as an advance payment on rent." The receipt acknowledges payment of the sum "as advance payment on rent." Kibbe, in the proposal, agrees to keep this "advance payment" good during the first five years of the lease, with the privilege of "reducing at the rate of \$6,666.66 per year for the third (3), fourth (4) and fifth (5) years of said term." This language, in

the absence of extrinsic evidence explaining its meaning, is fairly susceptible of no other construction than that the \$20,000 was paid on account of the rent to become due the third, fourth and fifth years of the term. The money was paid to defendants, not deposited with a third person. The agreement of Kibbe to keep the "advance" good during the first five years of the lease does not convey the idea that the payment was as security, when construed with the provision giving the right to "reduce" the advance by applying one-third thereof to the payment of rent for each of the third, fourth and fifth years of the term. While the \$20,000 may in fact have been paid as security, as it may in fact have been paid as a consideration to remove an obstacle that arose in the negotiations for the lease, on the pleadings and evidence we must and do hold that it was what the pleadings and evidence call it, an advance payment of rent.

The question then is this: The tenant having, at the time of entering into the lease, paid \$20,000 on account of the rent for the third, fourth and fifth years of the 15-year term, and the landlord having terminated the lease during the first year for a reason which, under the terms of the lease, justified the act, can the tenant, or his trustee in bankruptcy, recover back the advance rent so paid? The lease expressly provides that if the lessee shall be declared bankrupt or insolvent, the lessors may declare the term ended, re-enter the premises, take possession thereof and hold the same as fully and completely as if the 15-year term had expired. It also provides that such termination of the lease, re-entering, occupying or re-renting the premises, "shall in no manner act as a forfeiture of any rent due, or to grow due, or the right of said lessors to the performance of the covenants and agreements by said lessee to be kept and performed as specified herein."

We are unable to agree to the claim of plaintiff that upon the bankruptcy of the lessee the lessors might have re-entered the premises, without terminating the lease, and have held the lessee to the performance of all the covenants in the lease, including the payment of rent for the balance of the term. The lease gives the lessors no such right; the default clause provides that the lessors may, at their election, declare the term ended and re-enter the premises. It gives but

a single remedy. Of course defendants were not obliged to terminate the lease, but they had the clear right to do so, and certainly were not bound to retain a bankrupt tenant, with the probability of non-payment of the rent, and a sale of the leasehold by the bankrupt estate.

It is the law that, upon the assertion of a forfeiture by the landlord, he is still entitled to rent which had previously become due, but not entitled to recover rent subsequently to become due. Indeed, such a forfeiture terminates the relation of landlord and tenant, and no rent can subsequently become due. 1 Tiffany, Landlord & T. 1174; 18 Am. & Eng. Enc. (2d ed.) 392; 24 Cyc. 1359; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241. This is clearly the settled doctrine where there is no express stipulation in the lease giving the landlord the right to recover the rent for the balance of the term. Where there is such a stipulation, the tendency of the decisions is to hold it valid, and to continue the liability of the tenant in spite of the termination of the lease. Such liability is for any deficiency in the amount of rent obtained on a lease to another. 1 Tiffany, 1175, et seq. and cases cited. This is not strictly a liability for rent, but a contractual liability based upon the agreement in the case.

In case the rent has been paid in advance under a stipulation that it shall be so paid, and the landlord re-enters for conditions broken, even in the absence of an agreement to that effect, the landlord is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent was paid. Hepp Wall Paper Co. v. Deahl, 53 Colo. 274, 125 Pac. 491. Even where the rent has not been paid, though according to the lease it was payable in advance, the weight of authority is that the landlord may recover the rent for the whole period for which it was due, though he re-enters on the day after it falls due. 1 Tiffany, 1179; 18 Am. & Eng. Enc. (2d ed.) 302, and cases cited. In criticising Massachusetts and Michigan cases denying the right of recovery, Mr. Tiffany says they are decided without any discussion of the matter, and that it is difficult to understand how, rent having become due at the

commencement of the rent period, it can cease to be due because the tenancy subsequently comes to an end.

Under these rules, had the lease required Kibbe to pay the first year's rent in advance, and had he done so, the re-entry of defendants six months after the tenancy began, for breach of conditions by Kibbe, would operate to terminate the relation of landlord and tenant, but would not entitle Kibbe to recover any portion of the rent so paid. This would be so though the lease had not provided that the rent so paid would be forfeited. Does it change the situation that the payment was made as advance rent for a part of the term in the future after the time the relation has ceased? It is said that, because there is no occupancy of the leased premises, no rent is earned. But the same may be said of any case where rent has been paid in advance and the tenancy terminated before the period for which the rent was so paid expires.

In this case the parties stipulated that a re-entry of the lessor for conditions broken should not work a forfeiture of the rent due or to grow due. There can be no fair doubt that this agreement covers the \$20,000 payment of rent in advance. It is urged that this stipulation in the lease is invalid, because providing a penalty for the tenant's breach of covenant. We cannot sustain this view. It is not necessary to hold that a provision making the tenant liable for the rent the full term would be valid, though there are cases so holding. Here we have at most a forfeiture of a sum amounting to one-half of the first year's rent. The parties were dealing in large figures. The rent for the entire term would be over \$800,000. The hotel was a very valuable property, and it is not difficult to see the injury that would probably be caused by an act of the tenant that made necessary a cancelation of the lease, with the consequent vacancy, damage to the property, and difficulty in securing a new tenant who was competent and responsible. And it would be difficult to measure the damages that might be so caused. It is not improbable that these considerations moved defendants to insist on the advance payment. We are unable to say, conceding that defendants' right to the money depends



upon the validity of the so-called forfeiture clause, that they are not entitled to retain it.

There seems to be no adjudicated case that is on all fours with the case at bar. As we have already said, the New York cases relied on by plaintiff are clearly distinguishable, as in each it was expressly provided that the payment was made as security. The distinction is clearly pointed out in one of the cases. *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358. The case of *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241, cited by plaintiff, is not in his favor. *Dutton v. Christie*, 63 Wash. 372, 115 Pac. 856, relied on by defendants, does not decide the precise question involved here. In that case the lease declared that it was given in consideration of the covenants of the lessee and of the payment of \$1,500, with the stipulation added that the payment should, in case of full performance of the contract, be credited in payment of the rent for the last two months of the term, but otherwise that it should belong to the lessor as a part of the consideration for the lease. The decision that the lessor was entitled to retain the payment was based upon the proposition that it was paid as such a consideration, and that, when so paid, the title passed to the lessor.

We hold that the \$20,000 payment was made as an advance payment on the rent for the third, fourth and fifth years of the term; that it was the default of the tenant that prevented his right to have the payment so applied, and that neither he nor plaintiff, who of course stands in his shoes, can recover back the payment so made.

Order affirmed.

HENRY L. BODKIN v. GREAT NORTHERN RAILWAY  
COMPANY.

W. J. BODKIN v. SAME.

INGER BODKIN v. SAME.<sup>1</sup>

January 2, 1914.

Nos. 18,295—(91).

**Negligence—evidence—verdicts not excessive.**

Plaintiffs were the owners of furniture, wearing apparel and ornaments in rooms in a hotel that was destroyed by fire. It is *held*:

(1) The evidence justifies the finding that defendant was negligent in running a locomotive over and cutting a hose laid across its track on a street, and thus prevented extinguishing the fire.

(2) The damages awarded plaintiffs, for the destruction by fire of the property in their rooms, were not excessive.

(3) The evidence does not show that plaintiffs would have suffered any loss from smoke had the hose not been cut.

Three actions in the district court for Clay county to recover for the destruction of wearing apparel and ornaments and other private property in a hotel fire. The cases were tried together before Nye, J., and a jury which returned a verdict of \$220 in favor of Henry L. Bodkin, \$160 in favor of W. J. Bodkin and \$620 in favor of Inger Bodkin. From an order denying defendant's motion for a new trial in each action, it appealed. Affirmed.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*Charles S. Marden*, for respondent.

<sup>1</sup> Reported in 144 N. W. 937.

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Note.—On the question of the duty of a steam railroad, or street railroad, company to avoid interference with extinguishment of fire, see notes in 12 L.R.A.(N.S.) 382; 20 L.R.A.(N.S.) 1110; and 39 L.R.A.(N.S.) 20.

BUNN, J.

These three actions were brought to recover damages to personal property, claimed to be sustained by each of the plaintiffs by reason of the destruction by fire of the Columbia hotel in the city of Moorhead. Plaintiffs occupied rooms in the hotel at the time of the fire, and had therein the property claimed to be damaged, consisting of furniture, wearing apparel and ornaments. It was claimed that defendant negligently ran an engine over and cut a line of hose of the fire department of the city, and thus prevented the extinguishment of the fire. The cases were consolidated and tried together. Plaintiff Henry L. Bodkin had a verdict of \$220, W. J. Bodkin a verdict of \$160, and Inger Bodkin a verdict of \$620. Defendant appealed from an order denying a new trial of the actions.

The assignments of error raise the question of the sufficiency of the evidence to sustain the finding of the jury that defendant was negligent, and its sufficiency to sustain the respective verdicts as to the amount of the recovery in each case.

In *Erickson v. Great Northern Ry. Co.* 117 Minn. 348, 135 N. W. 1129, 39 L.R.A.(N.S.) 237, Ann. Cas. 1913D, 763, we held the evidence sufficient to sustain a verdict against the defendant for the destruction of the hotel by the same fire. The facts are stated in the opinion in that case, and need not be restated here. It was there held that the evidence justified the jury in finding that defendant was negligent in running over the hose. It is the claim of defendant on this appeal that the evidence differed in essential particulars from the evidence in the *Erickson* case, and was not sufficient to justify the conclusion that the engineer in charge of the engine that ran over the hose knew or ought to have known that the hose was lying across the track. The argument is mainly directed to proving the absence in this case of certain evidentiary facts stated in the opinion in the *Erickson* case to exist. It was there stated, for instance, that the engineer had stayed at the hotel over night, and knew of the presence of smoke, or the smell thereof, when he left for the depot, where the locomotive was awaiting him. It is claimed that in the instant case there is no evidence to show that either the engineer or anybody else knew there was a fire in the hotel at the time the engi-

neer left for the depot. It is stated in the Erickson opinion that there was evidence that quite a volume of smoke came from the fire when the engineer started to back his engine, and that he looked at the smoke. It is here claimed that no smoke was to be seen until after the engine had cut the hose. It is further claimed that the evidence here does not show the presence of any volunteer firemen or other persons around the fire before the hose was cut, or that the engineer had a clear view of the hotel for about 100 feet before reaching the hose, which items of evidence were present in the Erickson case.

It may be conceded that the evidence is not as satisfactory on the above-mentioned points as it was in the Erickson case, but taking the evidence as a whole, we are not prepared to hold that the jury was not justified in finding that the engineer knew or ought to have known of the fire, and that he ought, in the exercise of reasonable care, to have looked for the hose across the track. That he could have seen it had he looked for it, there can be little doubt. And we think the evidence warrants the conclusion that he ought to have looked for it. He was entirely familiar with the streets and tracks. It was broad daylight. The evidence is conflicting as to his knowledge of the fire at the time he left the hotel, as well as his seeing the smoke and other evidences of the fire after he started to back his engine and while he still had time to stop before passing the crossing where the hose was. As in the Erickson case, the fireman was not called as a witness and the failure to call him was not explained. There is also the same evidence that the fire bell was rung, and the evidence of the signals given the watchman in the tower. We hold, without further discussion of the evidence, that the verdict has such support that we ought not to disturb it.

The contention that the verdicts are excessive is based upon the claim that the evidence proves that much of the property testified to have been lost could not have been destroyed by the fire. The claims of the respective plaintiffs were evidently regarded by the jury as somewhat extravagant, as the verdicts are considerably less in amount than the testimony of plaintiffs as to the value of the property lost. Plaintiffs did not testify that the trunks and suit case which contained much of their clothing were actually destroyed in the fire,

but simply that they were in the rooms and were not found after the fire. The evidence is not entirely satisfactory that the trunks and suit case, with their valuable contents, could have been so wholly obliterated by the fire, but taking the entire testimony as to the extent of the fire in the rooms, and as to the amount and value of the furniture, clothing and ornaments therein, with the very considerable scaling of plaintiffs' claims by the jury, we are unable to say that the damages awarded are excessive.

The point is made that plaintiffs failed to show how much of their damage was caused by smoke before the hose was cut, and how much by the fire, and therefore that they are entitled to recover but nominal damages. It is sufficient to say that the evidence does not show that plaintiffs would have sustained any loss from smoke had the hose not been cut.

Order affirmed.

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ANNA MATHILDA BENSON v. LEHIGH VALLEY COAL  
COMPANY.<sup>1</sup>

January 2, 1914.

Nos. 18,298—(172).

**Master and servant—termination of relation.**

1. As between the parties the relation of master and servant does not necessarily terminate by the sale and transfer by the master to a third person of the property and business in connection with which the relation arose and exists.

**Transfer of business—knowledge of employees—presumption.**

2. Where there is no actual change in the management of the business, and it is continued in the same general way after the sale, by the same servants and employees, and the servants are in no way expressly or other-

<sup>1</sup> Reported in 144 N. W. 774.

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Note.—On the question of the employer's duty to continue in business, see note in 6 L.R.A.(N.S.) 808.

wise informed of the transfer and the consequent change of proprietors, the relation is presumed to continue for a reasonable time, and the master remains liable to them to the same extent as though no sale or transfer had taken place.

**Burden of proof.**

3. The burden to show knowledge on the part of the servant is upon the master.

**Change of ownership—knowledge of decedent.**

4. Decedent was in the employ of defendant for several years; defendant transferred its business to a third person on March 1; the management of the business thereafter continued as before; he was fatally injured on March 13 by a defective instrumentality furnished by defendant; it is held that the question whether decedent knew of the change of ownership was one of fact for the jury.

**Inspection of machinery.**

5. The question whether decedent, the injured servant, was required by the duties of his employment to inspect the machinery and appliances with and about which he performed his duties, and to keep and maintain the same in repair was, on the evidence, one of fact for the jury.

**No reversible error.**

6. The record presents no reversible error.

Action in the district court for St. Louis county by the special administratrix of the estate of Henry Benson, deceased, to recover \$10,000 for the death of her intestate while in the employ of defendant. The case was tried before Ensign, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*H. S. Clapp and Luse, Powell & Luse, for appellant.*

*Samuel A. Anderson and Warner E. Whipple, for respondent.*

BROWN, C. J.

Plaintiff's intestate, employed as a servant upon and about certain coal docks owned by defendant at the city of Superior, in the state of Wisconsin, received a fatal injury from a defective instrumentality connected with said docks, and thereafter this action was

brought to recover the compensation provided for by the laws of Wisconsin for death by wrongful act. Plaintiff had a verdict and defendant appealed from an order denying its alternative motion for judgment or a new trial.

It is contended by defendant in support of the appeal, (1) that the relation of master and servant between decedent and defendant did not exist at the time decedent received the injury causing his death, and, therefore, that defendant is not liable; (2) that it was one of decedent's duties to inspect the instrumentalities, machinery and premises with and about which he was required to perform his work, and to repair defects therein or to inform his superior servants thereof, to the end that proper repairs might be made, and that the defective instrumentality causing the injury complained of should have been inspected by him which, had it been made, would have disclosed the defect, and that since he failed in his duty in this respect no recovery can be had; and (3) that there were errors in the instructions of the court to the jury for which a new trial should be granted.

1. The facts bearing upon the first contention, namely: That the relation of master and servant between defendant and decedent did not exist at the time of his injury, are as follows: The docks upon which decedent was at work were constructed and owned by defendant, and such ownership continued down to the time of decedent's death and, so far as the record discloses, still continues. They had been operated by defendant in the commercial handling of coal from the time of the construction thereof until March 1, 1912, at which date it is claimed they were leased to another corporation. Decedent met his death on March 13, or about two weeks after this change of proprietorship took place. Defendant was incorporated as the Lehigh Valley Coal Co. A short time prior to the first of March, 1912, there was formed in New Jersey a corporation named the Lehigh Valley Coal Sales Co., and it was to this corporation defendant claims to have leased the docks on March 1, relinquishing then and thereby all control over the operation of the same, though defendant remained the owner of the property. There is no controversy about the fact that these two corporations were independent

concerns, and it is not claimed that the "Sales" company was a representative of defendant, the "Coal" company. Sometime prior to the first of March the president of the "Sales" company issued a circular notice to the patrons of the "Coal" company in the following language:

**"LEHIGH VALLEY COAL SALES CO.**

**"90 West Street,**

**"New York.**

**"February 16th, 1912.**

**"NOTICE.**

"The Lehigh Valley Coal Sales Co. will purchase on March 1st, 1912, and thereafter, the Lehigh Valley Coal Company's output of anthracite coal at the mines, and will take over that company's business of selling, shipping and handling coal.

"The Lehigh Valley Coal Sales Co. assumes all the obligations of the Lehigh Valley Coal Co. with respect to agreements for the sale of coal; all payments for coal purchased should be made to the Lehigh Valley Coal Sales Co. on and after March 1st.

"Your continued patronage is respectfully solicited.

"John W. Skeele,

"President."

For many years prior to this transfer defendant had operated the docks through its agents and employees. Decedent was one of those employees, and for about four years prior to this transfer had continuously been in defendant's employ as an oiler of the dock machinery. Other employees included a superintendent and a foreman, who were decedent's superiors. A copy of the circular above set out was given to the superintendent, and he was thus expressly informed of the transfer to the sales company. The evidence, however, wholly fails to show that decedent was in any manner informed of the change of proprietorship. There is no evidence that he was expressly notified of the change, and the superintendent testified that he did not know whether decedent knew anything about it, though he thought that some of the employees had been informed thereof. The transfer



took place on March 1, and the death of decedent occurred on March 13 following. No change in the conduct of the business took place, the same employees continued in the same general work, and there was nothing to indicate to any of them, except the superintendent, that a change of proprietors had taken place. In this situation the authorities are clear that the original employer continues liable to the employees who have no notice of the change. In other words, as between the parties, the relation of master and servant is not necessarily terminated by a sale and transfer to a third person of the business in respect to which the relation arose. Labatt states the rule applicable to such a situation as follows:

"In an action by a servant for an injury caused by a defective instrumentality, the obviously reasonable and just doctrine is that, if he was allowed, without notice of a change of masters, to continue doing the same work as that for which he was first engaged, and on premises which ostensibly remained in the possession of his original employer up to the time of the accident, he should be entitled to hold that employer liable." Labatt, *Master & Servant*, § 31, subd. "c."

The authorities sustain this view of the law. *Soloman R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Missouri, K. & T. Ry. Co. v. Ferch* (Tex. Civ. App.) 36 S. W. 487; *Gulf, C. & S. F. Ry. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133; *Goldman v. Mason*, (City Ct. Brook.) 2 N. Y. Supp. 337; *State v. Trimble*, 104 Md. 317, 64 Atl. 1026; *Delaware, L. & W. Ry. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986; *Brennan v. Berlin Iron B. Co.* 74 Conn. 383, 50 Atl. 1030. And it is in harmony with the further rule, of general application, that when the master disposes of his business to another, without notifying the servant of the change, which in no way comes to the notice of the latter, the master continues liable for the servant's wages. *Perry v. Simpson*, 37 Conn. 520; *North Chicago R. M. Co. v. Hyland*, 94 Ind. 448; *Tousignant v. Shafer Iron Co.* 96 Mich. 87, 55 N. W. 681. In the last case cited it was further held that the burden of showing that the servant had notice of the change of masters is upon the original employer. This is in harmony with the general doctrine that personal business relations once shown to exist will be presumed to continue for a reasonable time, in accord-

ance with the nature of such relationship. 2 Modern Evidence (Chamberlayne), § 1046; 22 Am. & Eng. Enc. (2d ed.) 1240. In this case the relation of master and servant was shown to exist down to March 1, and, since defendant gave no notice to decedent, the presumption referred to applies. The question was properly submitted to the jury.

2. The docks were supplied with all usual and necessary machinery and appliances for transferring coal from lake vessels to the dock and into the dock pockets or bins, and from there to cars for shipment to the trade. The coal was unloaded from the vessels, and after passing certain screens would be discharged into a chute leading to a pocket where it remained until transferred for shipment. The chutes were quite heavy, and the one causing the death of decedent had been out of use for some time and was filled with coal and coal dust. Decedent and his fellow workmen were ordered by the superintendent or foreman to clean out this chute and the pocket to which it carried coal. In doing the work it was necessary to remove the coal in the pocket, upon which the chute to some extent rested, and when that was done the chute, by reason of the defective condition of its fastenings, arising undoubtedly from the elements and long-continued use without proper repairs, fell upon decedent and killed him. There can be no question on the evidence that the chute was in a defective condition, the fastenings holding it in position were rusted to such an extent as to render them insufficient to sustain it in position after the coal in the pocket had been removed. Nor can there be any serious question that a proper inspection of the chute would have disclosed the defect which, had it been repaired, would have avoided the accident.

It is elementary that the master owes his servant the duty of exercising reasonable care in supplying to the latter safe instrumentalities, and a reasonably safe place in which to perform his work, and this duty includes the matter of inspection from time to time, to the end that the instrumentalities and place of work may be maintained in a safe and suitable condition. The rule stated applies to this case, and the evidence presented a question of fact for the jury whether defendant had performed the same. And, unless the con-

tention of defendant that the duty of inspection rested upon decedent be sustained, the verdict must stand. So that the important question on this branch of the case is whether the duty of inspection had been cast upon decedent as one of the duties of his employment. We think, and so hold, that the evidence made this alone a question for the jury.

Decedent's specific duty, and the one he was expressly employed to perform, was to oil the various gearings and bearings of the machinery attached to the plant; in addition to which he performed such other work as he was from time to time directed by his superiors. The structure going to make up the docks was very large and contained considerable machinery which was operated by motive power, and a proper performance of his duties as oiler necessarily took up a considerable portion of his time. There was evidence tending to some extent to show that he was charged with the additional duty of inspection, and to repair defects in the machinery or appliances, and when he could not do so himself, to report them to his superiors; and further that he was under direction to keep on the lookout for such defects. But the evidence is far from conclusive that defendant intended to impose upon him the entire responsibility for the safe condition of the premises, or the performance of its own obligations to keep the machinery in working order and free from defects. And the jury were warranted in concluding that defendant expected of him in this respect nothing more than it expected from all its servants.

The situation would no doubt be different had decedent's employment been specifically that of inspector, or if by rule or order he was made responsible for the condition of the instrumentalities with which he was required to work. 4 Labatt, Master and S. § 1338. But that rule does not necessarily apply to the facts here before the court. The particular chute causing decedent's death had been out of use for some time, it was filled with coal and coal dust, and the defect which caused it to fall, evidently existing for some time, though it was not open or obvious, could easily have been discovered by proper inspection. The evidence did not require the jury to find that decedent ever acted as inspector for this purpose, or that de-

fendant relied upon him exclusively to furnish information upon the subject. Nor does it show that the particular chute was one of the instrumentalities with or about which decedent was required to perform his daily work. On the contrary the evidence is undisputed that decedent was employed as an oiler of the machinery, and the question whether he was also charged with the general duty of inspection was one of fact. In this view of the case, which we think the record fairly sustains, we need not stop to consider whether the master may in this manner wholly relieve himself of the duty of providing his servants with safe appliances. *Le Duc v. Northern Pacific Ry. Co.* 92 Minn. 287, 100 N. W. 108.

3. A consideration of the charge of the court, taken as an entirety, discloses no substantial error, at least none which will justify a new trial of the action. The statement of the court to the jury that it was one of the absolute duties of the master to exercise reasonable care in providing his servants safe instrumentalities and a safe place to work, was abstractly correct. Of course where the master expressly imposes upon the servant the duty of inspecting the instrumentalities with which he performs his work, as to that particular servant the master is perhaps relieved from responsibility (*Scott v. Eastern Ry. Co. of Minn.* 90 Minn. 135, 95 N. W. 892), though the duty continues as to the other servants in the same service and who are not charged with the duty of inspection. In the case at bar the court distinctly said to the jury that if decedent was charged with the duty "to inspect the chute as to its safety, and he failed to do so, the plaintiff is in no position to claim that the defendant was negligent in that regard." In addition to this instruction the court further stated to the jury that defendant claimed that decedent was for "four years" prior to the accident "inspector of the building and of the machinery" therein, and the question whether the evidence sustained the claim was left for them to determine. The charge of the court upon the question of the severance of the relation of master and servant between decedent and defendant was correct. Taking all that the court said upon this question, it is clear that the jury were given to understand that, if decedent knew of the transfer by defendant to the sales company and thereafter continued in his work, he would be deemed

to have acquiesced in the change of masters. While the court did not use this precise language, what was said clearly conveyed the substance thereof to the jury, and they must have so understood. The court also fully submitted to the jury the questions of contributory negligence and assumption of risk, and the charge taken as a whole sufficiently included the substance of defendant's requests which were refused.

This covers all that need be said. We have examined the record in reference to all the assignments of error and find no sufficient reason for ordering a new trial. The evidence supports the verdict.

Order affirmed.

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**NICK KEES v. FRED CHRISTENSEN.<sup>1</sup>**

January 2, 1914.

Nos. 18,344—(154).

**Farm lease—evidence of custom excluded.**

1. A lease of farm land construed and *held* definitely to fix the duration thereof, and that evidence tending to show a custom in respect to the date of the termination of such leases was properly excluded by the trial court.

**Extension of lease—evidence.**

2. *Held* further that the evidence was insufficient to sustain the claim that a payment of more than was due for the last two months of the tenancy operated to extend the lease for the period of another year.

Action in the municipal court of Minneapolis for the restitution of certain premises. The case was tried before C. L. Smith, J., who at the close of the testimony denied defendant's motion for a directed verdict and directed a verdict in favor of plaintiff. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

<sup>1</sup> Reported in 144 N. W. 766.

*Wilson, Mercer, Swan & Stinchfield*, for appellant.  
*Dowdall & Williams*, for respondent.

BROWN, C. J.

This cause comes to this court on an appeal by defendant from a judgment for plaintiff in forcible entry proceedings had before the court below.

The facts are in brief as follows: About the seventh day of May, 1909, plaintiff leased to defendant certain farm land at the agreed annual rent of \$480, payable in monthly instalments, and the tenancy was continued from year to year until the year 1913. Though defendant entered into the possession of the premises under the original letting about May 10, 1909, the rent-paying period commenced on the fifteenth of that month, and he regularly thereafter paid the rent at about that date each month. On March 15, 1913, plaintiff, desiring to end the tenancy, duly gave to defendant notice to vacate the premises. Defendant refused to vacate and this proceeding followed, having been commenced on May 28, 1913.

1. There was no controversy on the trial concerning the service of the notice to quit. It was served on March 15, on the theory that the lease expired on May 15 following. It is contended by defendant that the term of the lease in fact expired in March, and therefore that the notice to vacate was insufficient. In support of this position defendant offered to show that by common custom yearly leases of farm property, where no specified date is fixed by the contract, terminate and end between March 1 and April 1. This evidence was excluded by the court on the theory, as we understand the record, that the date of termination of this lease was definitely fixed by the contract and, therefore, that the custom in the case of a lease which is silent upon the question, had no application. In this view we concur. The contract was entered into about the seventh of May, and, according to the testimony of defendant, was for the lease of the premises for one year with a monthly payment of rent. He also testified that the first payment of rent was made on May 15, and was subsequently paid each month about that date. He further testified that subsequent to the first year the lease was continued,

running from year to year on the same terms. Other evidence tended only to confirm defendant's testimony, and to the effect that the tenancy commenced on May 15, and continued on from year to year as a yearly tenancy. It was therefore a definite contract with no uncertainty or ambiguity as to the time of the expiration thereof, and the custom invoked by defendant is inapplicable. The evidence was clear and there was nothing to submit to the jury upon the question and the court properly disposed of it as a matter of law.

It is further contended that, by reason of the facts presently to be stated, there was by operation of law an extension of the lease for the further period of a year from March, 1913, and that the trial court erred in not so holding. This contention is without special merit. The facts upon which it is founded are not in dispute and as follows: Some time in February, 1913, some negotiations were had between the parties, looking to an extension of the lease for another year. But no agreement or understanding was ever reached. It is claimed that the plaintiff agreed to an extension, on the understanding that a new barn should be constructed on the premises, but it is conceded that defendant did not accept the offer. A few days thereafter plaintiff offered to extend the term at an increase of \$100 in the rent, and it is conceded that defendant did not accept this offer. A few days later he made an offer of acceptance when plaintiff replied that he was too late, and that the premises had been leased to another person. This ended all negotiations looking to an extension. However, on March 15, the day on which notice to vacate was issued, defendant paid to plaintiff the sum of \$48.34, as and for the rent then due. This was \$8.34 more than was in fact due, and plaintiff refused to accept more than \$40, the actual amount due. The reason prompting defendant to make this overpayment seems to have been a claim that he was entitled to an extension of the lease at the rate of \$580 per year, and he made known his claim in this respect when he made the payment, and when plaintiff declined to retain more than \$40, the amount due under the original contract, defendant reminded him that he must accept the whole amount or take "none of it." The same payment was made on April 15, and the same refusal of plaintiff to accept more than was actually due

him; the surplus on this occasion, defendant having refused to accept it back, was placed in plaintiff's safe for him.

The contention that the facts stated justify the conclusion that by the transaction plaintiff waived the notice to vacate and in legal effect consented to an extension of the lease for another year, does not require extended discussion. It is obvious that a tenant cannot in this manner force from the landlord a renewal of the contract. The plaintiff had the undoubted right to retain the money actually due him for rent under the original contract, and the balance of the overpayment was, on defendant's refusal to accept it, properly held subject to his order. Under the original contract the tenancy did not terminate until May 15, and there was due from defendant the sum of \$40 for each of the months of March and April, when these two payments were made. The doctrine of the application of payments is wholly irrelevant to these facts, and the case of *Kenny v. Sen Si Lun*, 101 Minn. 253, 112 N. W. 220, 11 L.R.A.(N.S.) 831, 11 Ann. Cas. 60, is not in point. If this case had been one where the original tenancy had terminated and the landlord was not entitled to any part of the money paid, some of the arguments of counsel would be pertinent and in point. It is not, however, such a case.

This covers all that need be said. There were no errors on the trial below, and the judgment appealed from is affirmed.

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JOHN A. ROY v. JOHANN WILHELM DANNEHR and  
Another.<sup>1</sup>

January 2, 1914.

Nos. 18,357—(136).

**Boundary line—monuments—general verdict.**

Ejectment for a strip of land between adjacent landowners. Plaintiff claimed the strip as part of his 80-acre tract according to government

<sup>1</sup> Reported in 144 N. W. 758.



survey, also by adverse possession and by practical location of the boundary line or acquiescence. *Held:*

(1) Monuments placed by a county surveyor pursuant to section 773, G. S. 1913, show *prima facie* the section corners and quarter posts of the government survey. Plaintiff failed to adduce testimony sufficient to go to the jury of any other dividing line according to the original government survey between his and defendants' land than the one indicated by said monuments, and it was error to submit the question of government boundary line to the jury.

(2) The evidence is far from conclusive in plaintiff's favor upon either of the other two grounds of recovery, therefore a general verdict, which may have been based on the ground erroneously submitted to the jury, should not be permitted to stand.

Action in ejectment in the district court for Hennepin county and for \$630 damages. The case was tried before Hale, J., who, at the close of plaintiff's case, denied defendants' motions for a directed verdict and for a dismissal of the action, and a jury which returned a verdict in favor of plaintiff. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Reversed and new trial granted.

*Latham & Pidgeon and A. T. Larson*, for appellants.

*F. H. Castner*, for respondent.

HOLT, J.

Plaintiff owns the north half of the southeast quarter of section 6 in township 118 of range 24 Hennepin county. Defendants own the southwest quarter in the same section. The action is in ejectment. Over 20 years ago the county surveyor of Hennepin county under section 773, G. S. 1913, placed stone monuments at the corners and quarter posts of this section. Defendants claim up to a straight line run between the south and north quarter posts indicated by these monuments. Plaintiff claims the true boundary to be a line 25 feet further west at the south line of his premises and 52½ feet further west at the north line thereof. He bases his right on three grounds: (a) A true survey according to government monuments; (b) adverse possession, and (c) practical location or acquiescence. The court submitted the three to the jury. A general verdict

was returned awarding plaintiff possession of the strip. Defendants appeal from the order denying their alternative motion for judgment or a new trial.

Plaintiff's father bought the 80 acres described in 1883 upon which plaintiff has ever since resided and now owns. A year later defendants became the owners and entered into possession of their farm. Plaintiff has never enclosed the west part of his land or cleared or cultivated the same. He seems to have made use of it as a wood lot, cutting some timber, cutting the natural meadows and also cutting the grass on two small patches of marsh or meadow extending onto the strip in dispute when the seasons were not too wet. One of these two small patches is a rod square and the other 35 feet by 135 feet. Defendants for at least 12 years prior to this action enclosed the easterly part of their land for a pasture and in so doing built a fence upon what plaintiff claims to be the true survey and boundary line as above stated. Plaintiff claims the fence was built 17 years prior to the commencement of the suit.

Two or three recent surveys confirm the claim of defendants to the strip in question, in that it is located west of a straight line drawn between the north and south quarter post monuments. Also that these monuments are the ones placed by the county surveyor under the section referred to. This being conclusively proven, these monuments become *prima facie* evidence of the true location of the quarter posts according to the original government survey. From an attentive examination of the record we are of the opinion that the evidence tending to overcome this *prima facie* correct boundary between these parties is entirely insufficient to go to the jury. The only basis for plaintiff's claim that defendants' fence was upon the true division line according to government survey is this:

One Brandes was produced as a witness and testified that in 1882 he was the equitable owner of defendants' land and, having sold some timber stumpage thereon, wished to know the lines. He then employed a surveyor from Wright county, procuring for his use the government field notes from the surveyor of Hennepin county, and a survey was made. This surveyor is dead. One of Brandes' sons who was along is also dead. Another son, then about 17 years of age,

it still living and testified for plaintiff. Brandes claims they located the government quarter post on the south line of the section from witness trees. This location of the quarter post is concededly the same as the stone monument placed by the county surveyor. He however testified nothing as to the location of the north quarter post. He left the surveyor after reaching the center of the section running from the south quarter post. The testimony of the son, as might be expected from one so young and who never appeared to have lived in the neighborhood or have had any interest in the lands, even on his father's account, since 1884, is hazy and indefinite. Neither witness pretends to have seen or located the north quarter post on this survey.

Some other witnesses testified to seeing a stake near the edge of a highway crossing from east to west at the center of the section, but that does not prove the correctness of the survey, if it be assumed that this stake was placed by the surveyor in 1882. It will be noted that, section 6 being the northwest corner section in the township, the surplus or deficiency, as the case may be, in the side lines of the township is added to or taken from the side lines of this section. And we find that the line from the south to the north quarter post is 38 feet more than a mile, while the line from the east to the west quarter post is 200 feet less than a mile. But the testimony does not disclose the distance from the south quarter post, admittedly in the right place, to the southeast corner, nor the distance from the north quarter post to the northeast corner. Presumably the government survey so placed the north and south quarter posts that the line passing through them would parallel the east section line. There is a total lack of evidence establishing any quarter post on the north line different from the stone monument placed under authority of section 773, G. S. 1913, or of any government field notes or measurements which in any manner impeaches the prima facie proof of the correct boundary according to the survey claimed by defendants. It therefore follows that, unless the evidence conclusively establishes title to the strip west of this line in plaintiff by adverse possession or by practical location or acquiescence, there must be a new trial.

The evidence to support title by adverse possession is far from conclusive. Plaintiff does not claim to have occupied adversely until

after defendants built a fence for their pasture. The former and his witnesses testified this fence was built more than 15 years prior to the commencement of the action, while the latter and their witnesses as strenuously insist that it was constructed less than 15 years ago. Moreover, the character of the adverse possession is not very persuasive. Plaintiff never joined any fence to the fence built by defendants, never cultivated up to the fence, and the cutting of the small patches of marsh or meadow did not occur every year. Plaintiff used his adjoining land as a wood lot, but there is no evidence that he cut any trees on the strip in dispute, except that he testifies he showed his attorney some large maple stumps from trees cut some 5 or 6 years before the trial. Surely title in plaintiff by adverse possession does not appear conclusively.

Neither can plaintiff claim that the evidence is conclusive that the true boundary is the line of the fence because of practical location or acquiescence. The record is absolutely barren of any agreement between the parties that the fence should be the division line. Brandes testified to having pointed out to the defendants, when they purchased, the line according to the survey two years before and the trees blazed on such line. Defendants deny this and state Brandes did not show the lines of any survey, on the contrary he professed ignorance of the true line, but stated his belief that it ran near where defendants subsequently built their fence. It is perfectly apparent that no surveyor would have run such a crooked division line as that taken by this fence. In the building thereof defendants did not hesitate to deviate several feet from the general course, whenever they could save a fence post by nailing to a tree. A pasture fence of a couple of rails or wires thus built by one wholly on his own land through the timber, indicating by its careless irregular course that the builder did not intend it as a true boundary line, ought not to be relied on by an adjacent owner who has had absolutely nothing to do with its location, construction, or use, as a division line by implied agreement or acquiescence, if such a term be at all appropriate to defendants' conduct. Our decisions are to the effect that one is not to be deprived of his land because he, through mistake or ignorance, placed a fence on what he thought was the division line, when it

was not such in fact, unless the evidence of practical location, or acquiescence for at least 15 years is clear, positive, and unequivocal. *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. 740; *Benz v. City of St. Paul*, 89 Minn. 31, 93 N. W. 1038; *Markusen v. Mortensen*, 105 Minn. 10, 116 N. W. 1021; *Marek v. Jelinek*, 121 Minn. 468, 141 N. W. 788.

As above stated, we have reached the conclusion that it was error to submit the location of the government division line between these two litigants to the jury. Upon this record there is no room for placing the same elsewhere than on the line shown by the defendants' proof. This error is properly raised by the seventh assignment of appellants. Necessarily it must result in a reversal, for, as shown, on neither of the other two grounds is the evidence conclusive in plaintiff's favor. It is not necessary to discuss other assignments of error relating to rulings upon proffered testimony, or the instructions of the court, for, on another trial, there is not likely to be any complaint in that respect.

We are urged to order judgment notwithstanding the verdict, but we are not disposed to so do upon this record. We are inclined to believe that upon a more careful trial the situation will be clarified so that the jury may be able to render a consistent verdict. The jury evidently labored under some confusion, for although possession of the controverted strip was awarded to plaintiff, he failed to recover the \$50 damages which defendants had caused by the cutting and carrying away of 112 young trees therefrom according to the uncontroverted evidence.

The order in so far as it denies a new trial is reversed and a new trial awarded.

MILTON DAIRY COMPANY v. GREAT NORTHERN  
RAILWAY COMPANY and Others.<sup>1</sup>

January 2, 1914.

Nos. 18,364—(26).

**Injunction—shipment of cream—enjoining prosecution of criminal action.**

Action by a creamery company engaged in manufacturing butter from cream, to enjoin certain carriers from complying with, and the attorney general from enforcing, Laws 1913, c. 433, regulating shipment of cream on railroads within the state, on the ground that such act is unconstitutional and compliance therewith would interfere with the supply of cream necessary to its business and that of other manufacturers similarly situated, thus causing great losses and eventual destruction of their business, *held* essentially one to enjoin the prosecution of criminal actions, and hence not maintainable as to any of defendants, notwithstanding the multiplicity of such actions against the carriers incident to enforcement of the statute; plaintiff's injury being merely consequential and incidental, without trespass against its property rights, and therefore insufficient to give it any proper status as plaintiff in the premises.

Action in the district court for Ramsey county against 10 railroad companies, 7 express companies, and Lyndon A. Smith, to determine that the act of 1913, regulating the shipment of cream upon the railroads of the state, was void; to enjoin defendants other than defendant Smith from observing the requirements of the act and from refusing to receive and ship cream to plaintiff and others, and restraining defendant Smith, as attorney general or otherwise, pending the determination of the action, from commencing any proceeding against defendants to compel them to observe the statute. From an

<sup>1</sup> Reported in 144 N. W. 764.

Note.—For authorities on the question of injunction against criminal proceedings, see notes in 21 L.R.A. 84; 2 L.R.A.(N.S.) 631; 25 L.R.A.(N.S.) 193; and 34 L.R.A.(N.S.) 454.

order, Catlin, J., granting plaintiff's motion for a temporary injunction, defendant Lyndon A. Smith appealed. Reversed.

*Lyndon A. Smith*, Attorney General, and *John C. Nethaway*, Assistant Attorney General, for appellant.

*Durment, Moore & Oppenheimer*, for respondent.

PHILIP E. BROWN, J.

Appeal by defendant Smith from an order directing issuance of a temporary injunction enjoining defendant railway and express companies, pending determination of the action, from complying with Laws 1913, p. 632, c. 433 (G. S. 1913, §§ 4385, 4386), regulating shipment of cream on railroads within the state, and also restraining defendant Smith, as attorney general or otherwise, from bringing actions or proceedings to compel any of his codefendants to comply therewith and from enforcing its penal provisions. The order was granted on the complaint and affidavits in support thereof, after answer interposed by defendant Smith, the record disclosing none other.

The complaint alleged plaintiff's ownership of an established business in St. Paul for manufacturing butter from cream, of great value, its good will alone being worth \$25,000, with a fixed trade and many customers in this and adjoining states, from whom large quantities of cream were bought and shipped to plaintiff's factory, the greater part of which came by rail from places more than 65 miles distant. It then substantially continues: Many other large manufacturers of butter in the state are similarly circumstanced, and before the act went into effect defendant carriers transported the cream mentioned to plaintiff and to them, on passenger trains, in express and baggage cars, under published tariff rates for intrastate transportation, but since have refused to receive the cream for carriage in Minnesota, except for distances not exceeding 65 miles, unless accompanied by a certificate of pasteurization, which regulation cannot be complied with. Further, defendant express companies have no refrigerator service, nor defendant railway companies on passenger trains, and the same could not be instituted within less than a year, and would require prohibitive freight charges. Moreover, both

methods of shipment provided in the act are unnecessary, either for protection of health or otherwise; and plaintiff cannot procure cream requisite for its business with necessary expedition, except by shipments over defendants' lines as heretofore, and their refusal to transport has greatly damaged such business, causing heavy loss, and persistence therein or enforcement of the act will result in destruction not only of plaintiff's business but also that of other manufacturers similarly situated. The act is alleged to be discriminative and otherwise void as in conflict with both state and Federal Constitutions, notwithstanding which defendant carriers will continue to comply therewith, fearing imposition of the penalties prescribed for violations. Defendant Smith is connected with the above allegations as being attorney general of the state, and, it is charged, will, unless forbidden, institute actions against his codefendants to compel them to comply with the terms of the act in case of their refusal, and cause impositions of the penalties prescribed, thus entailing multiplicity of suits and fines, the fear of which has induced obedience. Plaintiff purports to sue on its own behalf and likewise for all others similarly situated who shall see fit to make themselves parties.

The statute assailed prohibits shipment of cream for a distance of more than 65 miles over any railroad in the state, except in refrigerator cars kept effectively iced and in sanitary condition, unless the cream shall have previously been pasteurized. Railroad companies are forbidden to ship or receive for shipment cream except as provided, and violations constitute misdemeanors.

Court of equity's power to determine the validity of penal statutes and to restrain criminal prosecutions thereunder when unconstitutional, where such would directly result in irreparable injury to property rights, is undoubted, the question being the propriety of its exercise in a given case, and the rule, furthermore, being subject to the qualification that it does not authorize actions the gravamen of which is to enjoin criminal proceedings. See note, 25 L.R.A. (N.S.) 193; *Minneapolis Brewing Co. v. McGillivray* (C. C.) 104 Fed. 258, 272.

This court, in accord with many others, both state and Federal, for reasons to be adverted to later, has sanctioned such relief reluc-



tantly and cautiously. In *Cobb v. French*, 111 Minn. 429, 127 N. W. 415, a cream buyer and butter manufacturer sought an injunction restraining the state dairy and food commissioner from causing arrests of plaintiff and his agents for violations of an alleged invalid penal statute, requiring the licensing of operators of cream-testing apparatus, because enforcement would subject him to both irreparable damage in his business and expensive and injurious prosecutions. The court recognized the general doctrine, but denied relief, holding the action one to restrain the institution of criminal prosecutions involving no trespass against property, the latter, furthermore, being held an element necessary to be shown, entirely distinct from criminal prosecutions. The doctrine of that case was approved in *Nelson v. City of Minneapolis*, 112 Minn. 16, 18, 127 N. W. 445, 29 L.R.A.(N.S.) 260, where it was held that the purpose of the latter action was not to restrain a criminal prosecution, but to enjoin continued seizure and destruction of milk, sought to be justified under an ordinance alleged void. The court differentiated *Cobb v. French*, in recognizing the actual destruction of property as an injury directly resulting. In *Basting v. City of Minneapolis*, 112 Minn. 306, 127 N. W. 1131, 140 Am. St. 490, the rule was further recognized, and the reluctance of this court to interpose equitable interference with penal statutes was again manifested.

The present case involves neither trespass nor direct injury to property, but differs from *Cobb v. French* in that plaintiff does not claim to be threatened with criminal prosecutions under the act assailed. Indeed, it argues for the relief prayed because it is so circumstanced as to be unable to violate the statute and make test at law of its validity. Plaintiff's effort, then, is not directed at compelling defendants to observe a statute, but, on the contrary, to violate it, and the accomplishment of this result is sought through judicial examination thereof in equity, involving determination of its constitutionality, aided by a temporary injunction. Several questions are discussed, but all lead from and bring us directly to consideration of what we deem the primary question involved, namely: Does the complaint state a cause of action against any of defendants?

This objection may be raised prior to judgment. *Hamilton v. McIndoo*, 81 Minn. 324, 327, 84 N. W. 42; 2 Dunnell, Minn. Dig. § 7681.

As said in *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 156, 123 N. W. 785, 787, 18 Ann. Cas. 779, it will not do "to make of the courts, by equitable interference, a sort of superior upper house to consider and pass, in general and particular as well, upon legislative enactments." Likewise, it was declared in *Gibbs v. Green*, 54 Miss. 592, 612, quoted with approval in *Benz v. Kremer*, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842:

"Neither an executive nor a ministerial officer can be enjoined generally from putting a law in force. *Mississippi v. Johnson*, 4 Wall. 475 [18 L. ed. 437]. The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such act alone that he can restrain. This court has no power to examine an act of the legislature generally and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the Constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer, must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him."

See also *Minneapolis Brewing Co. v. McGillivray*, *supra*; and in the extreme case of *Ex parte Young*, 209 U. S. 123, 148, 28 Sup. Ct. 441, 449, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764, it was said, in discussing the propriety of granting the relief sought:

"The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

If this action may be maintained, it seems clear that, in all cases of attempted police regulations, whenever one receives merely incidental injury in property rights therefrom, resort to equity may be

had to adjudicate the constitutionality of the legislation, and meanwhile the criminal arm of the state may be tied, thus rendering such measures at least temporarily inoperative. This view opens a wide door when we consider the extent of laws regulating intoxicating liquors, shipments of live stock, game, and numerous others already on the statute books and certain to follow to meet future exigencies, many of which have and will necessarily cause pecuniary loss to persons not included within the penal provisions thereof. Nor is this all; for on the argument plaintiff confidently assumed the position that if it was not entitled to relief against the attorney general, yet defendant carriers, not having appealed from the order granting a temporary injunction, must obey it, which, if followed to logical conclusion, would seem to result either in annulment of the statute until plaintiff and the carriers see fit to bring the action on for trial, or in the paradox of compelling the law officers of the state, in performance of duties imposed upon them by law, to seek convictions of the carriers in the criminal courts for failing to do the identical acts prohibited by the civil branch of the same courts. The opportunity for collusion thus afforded, if such be the law, between those interested in avoiding, either temporarily or permanently, the effect of regulative legislation, would be tempting; and such statutes, no matter how necessary, would really go into effect, not according to their terms, but after test of constitutionality and judicial approval in actions wherein all parties are desirous of their defeat. Applied to railroad companies, the only prerequisites needed to bring about this result, would be legislation deemed by them undesirable, and a willing plaintiff claiming indirect injury therefrom.

We are satisfied the right to test the constitutionality of penal statutes has not been unduly limited by our decisions, and an extension of the doctrine would be a long step on the road to "government by injunction." We regard the limitation requiring direct, as distinguished from consequential injury, "distinct from the proceedings to punish personally for the commission of the crime," necessary in order to preserve the established boundaries dividing legislative and judicial authority, as well as civil and criminal jurisdiction. Moreover, substantially borrowing Mr. Justice O'Brien's observations in

Cobb v. French, *supra*, 434, and applying them to the present case, if the court is now, at plaintiff's instance, to entertain a suit in equity to prevent prosecution of the carriers, why should it not permit a similar action to restrain them from violating the statute, or, under like circumstances, the commission of any other offense, thus destroying the right of jury trial?

We hold the complaint alleges no direct injury or trespass to or against plaintiff's property rights, that the action is essentially one to restrain criminal prosecutions, and no cause of action is averred.

Order reversed.

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HARRY B. CAMPBELL v. CANADIAN NORTHERN  
RAILWAY COMPANY and Another.<sup>1</sup>

January 2, 1914.

Nos. 18,459—(156).

**Negligence of defendant conceded.**

1. Defendant, a railroad company, *held* precluded by its concessions on the trial from contending the court erred in charging it with negligence as a matter of law if it left a switch open, whereby plaintiff, an employee of its codefendant, was injured.

**Concurring negligence.**

2. Defendant, over whose track the train was being operated by another company under a traffic arrangement with the latter's own crew, could not escape liability on the theory that the accident was due to the neglect of

<sup>1</sup> Reported in 144 N. W. 772.

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Note.—As to the liability to servants where two or more railway companies use same tracks or station grounds, see note in 46 L.R.A. 102. And upon the liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract, see note in 44 L.R.A. 737.

On the question of the liability of a railroad company for injury to one riding on train run over its tracks by another company under license, through negligence of the licensee, see note in 36 L.R.A. (N.S.) 887.

one of plaintiff's fellow servants to keep a proper lookout, the case thus presented being merely one in which the latter's negligence concurred with that of defendant in producing the result complained of.

**Evidence conclusive.**

3. Under the rule that the positive testimony of an unimpeached witness cannot be disregarded, except for inherent improbability of the facts and circumstances disclosed, evidence *held* conclusive that compliance by the other company and its crew with the Federal act, requiring a certain proportion of the air on the train to be connected, would not have prevented the accident.

**Defendant liable for codefendant's negligence.**

4. As to such other company the track on which its crew was operating the train was "its," within the provisions of the Federal Employer's Liability Act, though owned by its codefendant, and under the doctrine of *Floody v. Chicago, St. P. M. & O. Ry. Co.* 109 Minn. 228, it was responsible for its codefendant's negligence in leaving the switch open or unlocked.

**Failure to submit question to jury.**

5. Defendant, not having, in its requests, referred to assumption of risk of an unlighted switch, *held* not entitled to complain of the trial court's failure to submit such question.

**Damages not excessive.**

6. Verdict *held* not excessive on the record properly before this court, but leave granted to apply to the trial court on evidence discovered since the trial for reconsideration thereof only.

Action in the district court for Ramsey county to recover \$20,000 for personal injuries received while in the employ of defendant Canadian company. The answer of the Canadian company alleged that under the laws of the state of North Dakota, in which state the derailment occurred, the servant or employee of the Northern Pacific Railway Co., whose duty it was to line up the switch on the passing track properly, was not a servant of the answering defendant, and that defendant was in no way responsible for any acts or omissions on the part of any employee of the Northern Pacific Railway Co. in respect thereto; that the North Dakota law was "that in order to establish the relationship of master and servant within the rule making the former liable for the latter's acts, the master must have

the right and power to hire the servant, to direct and control his acts, and to discharge and compel him to leave his employment and premises."

The case was tried before Brill, J., and a jury which returned a verdict against both defendants for \$16,500. From an order denying the motion of defendant Canadian Northern Railway Co. for judgment notwithstanding the verdict or for a new trial, it appealed. From an order denying the motion of defendant Northern Pacific Railway Co. for a new trial, in case plaintiff consented to a reduction of the verdict to \$12,000, it appealed. Affirmed.

*C. W. Bunn, George Hoke, Hector Baxter and H. Christopher, for appellants.*

*Barton & Kay, for respondent.*

PHILIP E. BROWN, J.

Action to recover damages for personal injuries, with verdict for plaintiff for \$16,500 against both defendants, subsequently reduced to \$12,000. The Canadian Northern appealed from an order denying its motion for judgment or a new trial, and the Northern Pacific from one denying the latter relief.

The first-named company operated a railroad in Canada, south-erly to our boundary, connecting there with one of its codefendant's lines in North Dakota, the two companies having a traffic arrangement whereby each delivered its cars to the other with its own crews. On the night of June 17, 1912, plaintiff, an engineer of the former, proceeded, under its orders and pursuant to the traffic arrangement mentioned, to take a train from its tracks in Canada to those of its codefendant in North Dakota, his duties requiring him to leave it on the latter's passing track, with which another of its tracks, designated as the "round-house track," connected; but when, shortly after midnight, he reached the switch at the juncture of the two tracks it was open, his engine was derailed, and he was injured.

Plaintiff claimed his injuries were caused by the Northern Pacific's negligence in leaving the switch open, or else in failing to have it locked after use; furthermore, that its codefendant was responsible for failure of duty in either of these regards. The negligence claims

were both submitted, the court charging that if the jury found an employee of the Northern Pacific failed to close the switch after its last use thereof before plaintiff brought his train on the passing track, such would constitute negligence on its part for which its codefendant would also be chargeable; further that, if the duty devolved on the Northern Pacific to keep the switch locked and it failed in this regard, this would likewise constitute negligence as to both defendants. Plaintiff's contributory negligence was submitted, but other defenses which will be referred to later were not.

1. The Northern Pacific now contends the court erred in charging it with negligence as a matter of law if it left the switch open. This defendant, however, foreclosed itself from so urging by its attitude on the trial, having conceded several times that the switch should have been thrown back after use so as to line up the passing track. The trial court was justified in assuming absence of dispute on this point. No error resulted.

2. This defendant claims error in refusal to submit, in accordance with its request, the question whether the accident was proximately caused by failure of the Canadian Northern trainmen, plaintiff's coemployees, to keep proper lookout for the switch, insisting it fairly appears from the evidence that the train, when approaching the switch, was moving at the rate of two or three miles an hour and under control, meaning ability to stop within seeing distance. It also appeared that a fellow servant of plaintiff, whose duty it was to look out for and throw switches for the crew and who was familiar with the tracks, rode on the front foot-board of the engine, and, by means of the headlight, could have seen the state of the switch two or three car-lengths ahead of the engine; so that, by due observance on his part, the accident could easily have been prevented. The correctness of the premises may be assumed, but plaintiff is not connected therewith otherwise than as a fellow servant. At most they would present merely negligence on the part of the company, in leaving the switch open or unlocked, concurring with that of plaintiff's fellow servant in failing to keep proper lookout, and hence would not avail defendant. *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949; *Novak*

v. Great Northern Ry. Co. *supra*, page 141, 144 N. W. 751; Gillespie v. Great Northern Ry. Co. *supra*, page 1, 144 N. W. 466.

3. The air brakes of the train were not connected and in working condition, as required by act of Congress and order of the Interstate Commerce Commission. Compliance therewith, it is argued, would have avoided the accident, wherefore it was error to refuse a request to the effect that, if the jury so found, then the verdict must be for this defendant. It is not urged that there is any evidence tending to establish this claim, but that the jury might have reached the conclusion indicated, notwithstanding the diametrically opposite testimony given concerning this matter on plaintiff's part. The discretion of the jury in the matter of credibility does not, however, warrant the disregard of the positive testimony of an unimpeached witness, unless its improbability furnishes a reasonable ground for so doing, which must appear from the facts and circumstances disclosed by the evidence. As said in *Second Nat. Bank of Winona v. Donald*, 56 Minn. 491, 493, 58 N. W. 269:

"It cannot be arbitrarily disregarded by either court or jury, for reasons resting wholly in their own minds, and not based upon anything appearing on the trial."

See also *Grover v. Bach*, 82 Minn. 299, 84 N. W. 909. The case before us is within the rule, and, in addition to the fact that it was not plaintiff's duty to connect the air, we deem the evidence conclusive that compliance with the law with regard thereto would not have changed the result.

4. The Canadian Northern claims the Federal Employer's Liability Act<sup>1</sup> of April 22, 1908, covers the case as to both defendants, and contends its duty, which it concedes, to furnish plaintiff a safe place to work does not bring it within the provision of the act making a carrier engaged in commerce between the states and foreign countries liable for injuries resulting, in whole or in part, from negligence of any of its officers, agents, or employees, or from any defect or insufficiency, "due to its negligence," in its cars, appliances, track or other equipment. More specifically stated, the claim is that these

<sup>1</sup> [35 St. 65, c. 149, U. S. Comp. St. Supp. 1911, p. 1322.]



provisions, and particularly the words quoted, conclusively indicate that this defendant cannot be held responsible for negligence of its codefendant, occurring on the latter's road, in leaving the switch open or unlocked, and that the owner of the road must here stand in the place of the master within the meaning of the statute. The argument advanced is that, as the act is in derogation of common law, it should receive strict construction as to liability thereby imposed; hence "its negligence" exempts the company from responsibility for negligence of another carrier on whose tracks its servants were employed, notwithstanding they were so engaged under its orders; in short, that rules of statutory construction require a holding directly contrary to the doctrine announced in *Floody v. Chicago, St. P. M. & O. Ry. Co.* 109 Minn. 228, 123 N. W. 815, 134 Am. St. 771, 18 Ann. Cas. 274, declaring liability against a company similarly circumstanced in its relation to its employee.

The question raised is of Federal cognizance, and no supporting authority is cited. We are satisfied, however, that the statute should not be construed so strictly as to "defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning." *Fulgham v. Midland Valley R. Co.* (C. C.) 167 Fed. 662. See also *Johnson v. Southern Pacific Co.* 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363; *Second Employers' Liability Cases*, 223 U. S. 1, 51, 32 Sup. Ct. 169, 56 L. ed. 327; *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125. It would be unusual, if the intention was to make so radical a change in established principles, for Congress to leave such to be spelled out by doubtful construction. Under the proofs, therefore, we think that, as to this defendant, the passing track should be deemed to be "its" the same as if it were operating that part of the road under lease; and, in the absence of authority to the contrary, we construe the act in this regard in harmony with the *Floody* case, and hold defendant's contention untenable, save with respect to the applicability of the statute to both defendants, deeming it so applicable.

5. Error is assigned by this defendant because the court failed to refer in its charge to the facts, established by the evidence, that

no light was maintained on the switch, of which plaintiff was aware, having previously made many night deliveries on the passing track without the switch being lighted. It is urged in this connection that the jury might have found the accident was thus caused and, under the doctrine of assumption of risk, would have been justified in returning a verdict against plaintiff. But this defendant made no reference to assumption of risk in its requests. What is said therein concerning absence of a switch light refers exclusively to its claim of irresponsibility for its codefendant's negligence. Under these circumstances we cannot declare error.

6. Both defendants assail the reduced verdict as excessive. We cannot so hold on the record properly before us, though the recovery is large. Apparently the jury, and also the trial court, were influenced by evidence tending to establish a resulting incapacity on plaintiff's part further to serve as a railway engineer. However, shortly before the argument in this court, application was made here by defendants for leave to move the district court for a new trial on account of newly discovered evidence conflicting with this theory. The application was denied, with permission, if affirmance resulted, to apply to the lower court for further consideration, on the evidence presented and that newly discovered, whether the verdict is excessive.

Orders affirmed, with leave to defendants to make such application on the question of damages only.

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## J. G. CHERRY COMPANY v. J. E. LARSON.<sup>1</sup>

January 9, 1914.

Nos. 18,232—(73).

### **New trial — assignment of error.**

1. Where a motion for a new trial is based upon several grounds, an assignment of error that the court erred in denying the motion, without specifying

<sup>1</sup> Reported in 144 N. W. 949.

ing the ground upon which it is claimed the motion should have been granted, is insufficient.

**Sale — rescission of contract.**

2. In this action it did not conclusively appear from the evidence that defendant had lost his right to rescind a contract of purchase for breach of warranty.

Action in the district court for Carver county to recover \$260. The facts are stated in the opinion. The case was tried before Morrison, J., who denied plaintiff's motion for a directed verdict and a jury which returned a verdict in favor of defendant. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

*T. R. Kane*, for appellant.

*W. C. Odell*, for respondent.

BUNN, J.

The complaint alleged that on August 16, 1911, defendant and plaintiff entered into a written contract, by the terms of which defendant ordered from plaintiff one 300-gallon Jensen cream ripener, and agreed to pay therefor the sum of \$260, by giving his note for that sum payable six months after the receipt of the ripener, with six per cent interest; that plaintiff delivered the ripener to defendant August 19, 1911, and that it was duly received and accepted by defendant on the twentieth; that plaintiff thereupon demanded of defendant that he execute and deliver the note, but that defendant has refused and still refuses to do so, or to pay the agreed price of the ripener, "all to the damage of this plaintiff in the sum of \$260, together with interest \* \* \* at the rate of six per cent per annum" from August 20, 1911. Judgment was demanded for such sum and interest.

The answer admitted that on August 16, 1911, plaintiff and defendant entered into a written contract, which was in the following words: "The undersigned purchaser hereby contracts for and orders of J. G. Cherry Company \* \* \* one 300-gallon Jensen cream ripener, guaranteed first class, for which purchaser agrees to pay \* \* \* the sum of \$260, payable as follows: J. E. Larson

to give a note payable six months after date of invoice with six per cent interest per annum until paid." The answer admitted the delivery of the ripener, and that defendant did not execute the note, or pay the agreed price. As a separate defense, it was pleaded in substance that the ripener was not first class, as guaranteed and represented, in that it splashed and roiled the cream, and did not distribute the temperature evenly throughout the vat; that the contract contained a provision that the title to the ripener should remain in plaintiff until the purchase money was fully paid, notes not to be considered as payment until redeemed; that under this provision the title did not pass to defendant on delivery; that, after making a trial of the ripener and within 15 days of its delivery, defendant notified plaintiff that it would not be accepted; and that on September 10, 1911, defendant returned the ripener to plaintiff at St. Paul. Judgment that plaintiff take nothing by the action was demanded. The reply was a general denial.

The complaint does not in terms ask to recover the purchase price of the ripener, but is for damages caused by the refusal of defendant to give his note as agreed. The answer claims a breach of warranty and a rescission on account thereof. The trial, which was to a jury, proceeded upon the theory that the burden of proof was upon plaintiff to show that the ripener was "first class," as guaranteed; that plaintiff was entitled to recover if it sustained this burden, or if defendant did not return the ripener within a reasonable time after discovering that it was not as guaranteed; that otherwise defendant was entitled to a verdict. The instructions were along this line, and the jury returned a verdict for the defendant. This appeal is from an order denying a new trial.

The assignments of error are: (1) That the court erred in denying plaintiff's motion to direct a verdict in its favor for the agreed price of the ripener; (2) that the court erred in denying plaintiff's motion for a new trial. The second assignment of error raises no question for our decision, as the motion was made on several grounds, and the assignment does not specify the particular error relied on. 1 Dunnell, Minn. Dig. § 363. We therefore have not before us the question whether the verdict is sustained by the evidence, or the cor-

rectness of any instruction or ruling, except the refusal of the court to direct a verdict for plaintiff.

The sole ground upon which it is claimed that plaintiff was entitled to a directed verdict is that defendant delayed an unreasonable time after discovery that the ripener did not fulfil the guaranty before rescinding the contract. As we have stated, this issue was submitted to the jury and decided in defendant's favor. The question here is whether it should be held as a matter of law that defendant was not entitled to rescind. There are strong suggestions in the evidence that after experimenting with and using the ripener, and finding that it splashed and roiled the cream, defendant did not promptly disaffirm the contract, but sought rather to obtain a reduction in the price. However, considering that under the contract the title remained in plaintiff, and the fact that some time was spent in experimenting and endeavoring, with the assistance of a representative of plaintiff, to make the ripener do its work properly, and in trying to make a settlement with plaintiff, we are not prepared to say as a matter of law that defendant waived his right to rescind.

Order affirmed.

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### FAYETTE MARSH v. WILSON BROTHERS.<sup>1</sup>

January 9, 1914.

Nos. 18,279—(157).

#### **Lien of garnishment.**

1. A creditor by the garnishment of a debt gets nothing more than an inchoate lien; and this inchoate lien can be perfected only by proceeding to judgment against the garnishee in the manner provided by statute.

#### **Tacking liens to defeat the bankrupt act.**

2. An inchoate lien by garnishment cannot be tacked to the lien of an execution on the judgment against the defendant and levied upon the indebted-

<sup>1</sup> Reported in 144 N. W. 959.

edness owing by the garnishee so as to make up the period of four months specified by section 60a, b, and section 67c, f, of the bankrupt act.

**Computation of time — preferred creditor.**

3. The defendant brought suit against one Grossman on April 27, 1912, and garnisheed one Galbraith. Nothing further was done by the garnishment. On June 15, 1912, it took judgment against Grossman and levied upon the debt due him by the garnishee. Grossman filed his petition in bankruptcy on September 14, 1912. It is *held* that the four months specified by the bankrupt act commenced to run in June, not in April, and that the trustee in bankruptcy could recover as a preference the money collected by the defendant on its execution.

Action in the district court for Ramsey county by the trustee in bankruptcy of Arthur Grossman to recover \$727.18. The case was tried before Brill, J., who made findings and ordered judgment in favor of plaintiff for \$720.18. From an order denying its motion to amend the conclusions of law or for a new trial, defendant appealed. Affirmed.

*Durment, Moore & Oppenheimer and Musgrave, Oppenheim & Lee*, for appellant.

*Jesse E. Greenman*, for respondent.

DIBELL, C.

This is an action by the trustee in bankruptcy of one Grossman to recover a sum of money received by the defendant Wilson Brothers upon an execution in its favor against Grossman upon the ground of a preference. There were findings for the plaintiff. The defendant appeals from an order denying its motion for a new trial.

1. On December 26, 1911, Grossman made a deed of trust to one Galbraith for the benefit of his creditors. It is conceded that the trust deed was invalid as to nonassenting creditors and that Galbraith was subject to garnishment. *Moore v. Bettingen*, 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913A, 816, and cases cited. On April 27, 1912, Wilson Brothers sued Grossman and garnisheed Galbraith, who disclosed an indebtedness in excess of \$3,000, the proceeds of the property received under the trust. Nothing further was done in the garnishment proceeding. On June 15, 1912, judgment was entered in favor of Wilson Brothers against Grossman. Execution was

issued on June 19, 1912, and levied upon the indebtedness of Galbraith to Grossman and the execution was satisfied on June 29.

The service of the summons on the garnishee binds the indebtedness to respond to final judgment. R. L. 1905, § 4232; G. S. 1913, § 7862. Judgment is rendered against a garnishee, if at all, for the amount due the defendant or so much as is sufficient to satisfy the plaintiff's judgment. R. L. 1905, § 4246; G. S. 1913, § 7876. When the property disclosed is an indebtedness, it is reached only through a judgment against the garnishee. The plaintiff in garnishment can perfect his inchoate lien only by pursuing the garnishment and entering judgment against the garnishee. 2 Shinn, Attachment, 1012. What Wilson Brothers got was under the execution of June 19. If another creditor had taken judgment and issued execution against Grossman after the garnishment of April 27, but prior to the execution of June 19, his right would have been superior to that of Wilson Brothers. Nothing was gotten by the garnishment for no lien was perfected. *Langdon v. Thompson*, 25 Minn. 509; *Pitzl v. Winter*, 96 Minn. 499, 105 N. W. 673, 5 L.R.A.(N.S.) 1009.

2. The inchoate lien which Wilson Brothers got on April 27, 1912, by its garnishment, cannot be tacked to the lien of its execution of June 19, so as to make the preference four months prior to bankruptcy. It is not like the voluntary exchange of one valid security for another of like value or the renewal of notes secured by a pledge of the same property, illustrated by *Sawyer v. Turpin*, 91 U. S. 114, 23 L. ed. 235, and *Chattanooga National Bank v. Rome Iron Co.* (C. C.) 102 Fed. 755.

3. The facts essential to constitute a preference are found. Bankrupt Act 1898, § 60a, b, 30 St. 562, as amended by act of February 5, 1903, 32 St. 797, 799, c. 487, § 13, and act of June 25, 1910, 36 St. 838. The preference must be within four months of the filing of the petition in bankruptcy. *Id.* See also Bankrupt Act 1898, § 67c, f, 30 St. 544. Grossman filed his petition in bankruptcy on September 14, 1912. The date from which to reckon the four months is in June and not in April. The preference was therefore within four months of the bankruptcy and the trustee in bankruptcy was entitled to recover the money collected by the defendant on its execution.

Order affirmed.

**BEN SCHULTZ v. CITY OF ST. PAUL.<sup>1</sup>**

January 9, 1913.

Nos. 18,288—(174).

**Question of negligence for the jury.**

1. In a personal injury suit it is held that the evidence made it a question for the jury whether the defendant city, which was engaged in raising a steel bridge by the use of hydraulic jacks, was negligent in furnishing such jacks for such use.

**Concurring negligence of fellow servant.**

2. If the negligence of the defendant in furnishing the jacks combined with the negligence of a fellow servant in adjusting them so as to make a case of concurring negligence causing the injury, the plaintiff could recover notwithstanding the negligence of his fellow servant.

**Assumption of risk.**

3. The question of the assumption of the risk was not one of law.

**Master and servant — limitation of action.**

4. Under R. L. 1905, § 768, and the charter of the city of St. Paul, section 690, prior to the enactment of Laws 1913, c. 391 (G. S. 1913, §§ 1786-1789), effective July 1, 1913, the limitation of one year after injury in which to bring suit did not apply when the claim was based upon a negligent failure of the city to observe a duty imposed upon it by law as an employer.

Action in the district court for Ramsey county to recover \$18,000 for injury received while in the employ of defendant. The complaint alleged that defendant negligently adopted an improper and dangerous plan for raising the bridge mentioned in the opinion, and negligently carried on the work upon the plan adopted; that the plan consisted in the use of timbers about 8 inches square and 19 feet long, placing one end thereof under the top part of the bridge and the other end upon a jack placed at the ground, without providing any

<sup>1</sup> Reported in 144 N. W. 955.

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Note. — On the question of the negligence of a fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business, see note in 4 L.R.A.(N.S.) 516.

124 M.—17.



safe or proper foundation for the jack upon the ground or placing anything on top of the jack for the timbers to rest upon, or doing or furnishing anything to hold the timbers in position, all of which should have been done; that, having so placed the timbers and jacks, the bridge was forced upwards by the use of the jacks and when so raised several inches the timbers came off of said jacks, and one of them struck plaintiff on the right leg, inflicting such injuries as to require the amputation thereof. The answer alleged that any injuries sustained by plaintiff were caused by his own negligence and arose from conditions, the risks and hazards of which were open and obvious to him. It also alleged that the action was begun more than one year after the happening of the injury alleged in the complaint. The case was tried before Catlin, J., who when plaintiff rested granted defendant's motion to dismiss the action. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

*Barton & Kay*, for appellant.

*O. H. O'Neill*, Corporation Attorney, *John A. Burns* and *William J. Giberson*, Assistant Corporation Attorneys, for respondent.

**DIBELL, C.**

This is an action for personal injuries. At the close of the testimony it was dismissed on the motion of the defendant. The plaintiff appeals from the order denying his motion for a new trial.

1. The plaintiff was in the employ of the city helping raise the Westminster street bridge. This bridge is two blocks long, crosses some railway tracks, and is of steel construction. In doing the work hydraulic jacks were used. They were placed on the piers below. On them were placed heavy timbers which reached to the framework above. By raising the timbers the bridge and steel posts were raised and steel plates were then placed underneath the posts which rested on the piers and which supported the steel framework above. The plaintiff claims that the defendant was negligent in making use of the hydraulic jacks for this work. The specific claim is that the hydraulic jacks furnished so small a facing for the timbers which rested upon them that they were liable to buckle and cause a fall. The evidence is such as to justify a finding that the timbers fell because

of such buckling and caused the plaintiff's injury. The plaintiff presented evidence which had a tendency to show that hydraulic jacks such as those used are not proper instrumentalities for use in such work. It was the duty of the city, just as of anyone engaged in like work, to exercise ordinary care to furnish reasonably safe and proper instrumentalities. The jury might have found that it was negligent in this respect. *Costello v. Frankman*, 97 Minn. 522, 107 N. W. 739; *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949; *Attix v. Minnesota Sandstone Co.* 85 Minn. 142, 88 N. W. 436; *King v. Chicago, Minneapolis & St. Paul Ry. Co.* 104 Minn. 397, 116 N. W. 918.

2. If the city was negligent in making use of hydraulic jacks and its negligence combined with that of a fellow servant of the plaintiff in adjusting them and the negligence of the two proximately contributed to the injury the plaintiff could recover notwithstanding his fellow-servant's negligence. *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949, and cases cited. Considering, for the purpose of this appeal, that the adjustment of the jacks was a fellow-servant act, the case was still for the jury.

3. It is claimed that the plaintiff assumed the risk of the use of the hydraulic jacks as a matter of law. He was a common laborer. At the most it was a question for the jury. The defendant justifies their use as reasonably safe.

4. It is provided by R. L. 1905, § 768, in substance, that any person who claims damages from a city for loss or injury from any defect in a street, road, bridge or other public place, or by the negligence of its officers, agents or servants, shall present to its council, or other governing body, within 30 days, notice of his claim; and that no action therefor shall be maintained unless such notice has been given, or more than one year after the occurrence of the loss or injury. The provision of the St. Paul charter, section 690, is substantially identical and it is immaterial which controls.

The plaintiff was injured on May 25, 1911, and the action was commenced on January 15, 1913. The defendant contends that the plaintiff's cause of action is barred.

In *Gaughan v. City of St. Paul*, 119 Minn. 63, 137 N. W. 199, it was held that the notice was not required when the injury came be-

cause of the failure of the city in one of its duties to the plaintiff imposed upon it as master. Whether the one year's limitation runs in a like situation has not been decided. The reasoning which induced the holding in the Gaughan case is controlling on the limitation feature of the statute, and we now hold that under section 768, and the provision of the city charter, section 690, the one year's limitation does not apply where the injury results from the negligence of the city in the performance of one of its duties as employer. It may be noted that by Laws 1913, p. 552, c. 391, § 4 (G. S. 1913, §§ 1786-1789), effective July 1, 1913, section 768 is repealed, and substantially re-enacted, but with the provision that the notice and limitation features shall apply to master and servant relations, and that the act shall apply to cities existing under charters framed pursuant to section 36 of article 4 of the Constitution.

Order reversed.

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**FRED EVERTSON v. JOHN McKAY and Another.<sup>1</sup>**

January 9, 1914.

Nos. 18,294—(141).

**Assault and battery — pleading.**

1. A general allegation of permanent injury resulting from an assault and battery alleged to have been committed upon plaintiff by defendant, *held* sufficient to admit evidence of the nature and character of the injury so claimed to be permanent.

**Same — motion to make more specific.**

2. The proper practice in such a case, where the general allegation is deemed insufficient, is to move the court for more specific allegations.

**Justification — refusal to charge.**

3. The defense to the action was, both by the answer and the evidence on

<sup>1</sup> Reported in 144 N. W. 950.

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Note.—The authorities on the right to use force to recover possession of chattel are reviewed in notes in 3 L.R.A.(N.S.) 251 and 19 L.R.A.(N.S.) 606.

the trial, a denial of the allegations of the complaint and of the evidence of plaintiff; no justification was pleaded or attempted to be made on the trial. It is *held* that the court did not err in refusing to instruct the jury upon the subject of justification as requested by defendants.

**Misconduct of jury.**

4. There was no abuse of discretion in denying a new trial on the ground of misconduct of the jury.

**Quære.**

5. When and under what circumstances, if at all, the owner, using no more force than is necessary, may forcibly repossess himself of personal property which has been wrongfully and unlawfully taken from him by a thief or other wrongdoer, *quære?* The question is not presented by the facts of this case.

Action in the district court for St. Louis county to recover \$2,000 damages for assault and battery. The case was tried before Dancer, J., and a jury which returned a verdict for \$1,200 in favor of plaintiff. From an order denying their motion for a new trial, on condition plaintiff consented to a reduction of the verdict to \$850, defendants appealed. Affirmed.

*John A. Keyes and Bert W. Forbes, for appellants.*

*Warren E. Greene and John H. Norton, for respondent.*

**BROWN, C. J.**

Action for damages for an alleged assault and battery committed by defendants upon plaintiff, in which plaintiff had a verdict and defendants appealed from an order denying a new trial.

It appears from the evidence that all the parties were fishermen, engaged in their occupation along the north shore of Lake Superior, in the vicinity of Grand Marais, in Cook county. Defendants Lemiere and plaintiff, who were working together, resided at Clark's Bay, and defendant McKay resided upon an island not far from the bay, and they were neighbors and friends. On the day complained of, October 25, 1911, plaintiff and Lemiere, in a fishing boat owned by the latter, went to the residence of McKay, for the purpose, as testified by plaintiff, of buying some liquor which McKay kept for sale. They arrived there some time in the afternoon, and each took several

drinks of whisky. At about six o'clock, plaintiff and Lemiere started for home, but upon reaching the lake shore where their boat was anchored Lemiere, at the request of McKay, returned to the house of the latter where they remained for about two hours. Plaintiff became impatient waiting for Lemiere, and finally at about 8 o'clock in the evening took the boat, which belonged to Lemiere, and started for home. He was soon overtaken by both defendants and, if his testimony be true, was violently assaulted by Lemiere under the encouragement of McKay. He was struck over the head with a large oar and knocked unconscious, after which Lemiere entered the boat and rowed it back to the McKay landing. Defendants assisted plaintiff into the house and put him to bed. He was bleeding from the wounds inflicted upon him, and he was later the same evening taken by Lemiere to their home at Clark's Bay. The evidence offered by defendants, as to the alleged assault, is flatly contradictory of that offered by plaintiff. Defendants deny that any assault whatever was committed upon plaintiff. Their evidence corroborates that of plaintiff in so far as concerns the act of plaintiff in taking the boat, and it was conceded by them that they started in pursuit for the purpose of retaking the same. But they insisted on the trial that no assault was committed upon the plaintiff, and that the injury of which he complains was received by plaintiff falling headlong in the boat, striking his head upon the side thereof. It is claimed that plaintiff was standing in the boat, and in a manner threatening to strike Lemiere with an oar, when a swell in the lake caused plaintiff to fall, and that he in this manner and no other received his injury.

1. This in brief states the case from the view-point of the respective parties. The truthfulness of the witnesses was for the trial court and jury. The jury gave credit to the testimony of the plaintiff, and the trial court approved their conclusion. In this situation of the case, in disposing of the contention of defendants that the evidence is insufficient to sustain the verdict, we simply say that the record has been examined with care, with the result that we find no sufficient reason for interference.

2. The principal injury to plaintiff was from a blow struck by Lemiere with an oar upon plaintiff's ear which, plaintiff claims, perma-

nently impaired his sense of hearing. Evidence tending to show this was objected to by defendants, on the ground that it was not pleaded in the complaint. The rulings of the court admitting the evidence are assigned as error. The contention is that an injury of this kind should be specifically set forth in the complaint, and that the absence of such allegation is fatal to the right of plaintiff to recover for the impairment of his hearing. In this we are unable to concur. The complaint pleaded generally "that said defendants then and there inflicted grievous bodily harm upon the plaintiff, and so beat and wounded him as to permanently disable him, and caused him great pain and suffering." We have held that allegations of this general nature are sufficient as against a general demurrer. *Casey v. American Bridge Co.* 95 Minn. 11, 103 N. W. 623, 624. And evidence of nervous prostration was held admissible under similar allegations in *Babcock v. St. Paul, M. & M. Ry. Co.* 36 Minn. 147, 30 N. W. 449. Unless we are to overrule these decisions, the complaint must be held sufficient to admit the evidence complained of in the case at bar. If general allegations of this kind are deemed by counsel insufficient or indefinite in respect to the precise nature of the injury, the remedy is by motion for more specific allegations. Where defendant permits the complaint to remain unchallenged until the trial of the action, he must be deemed to have waived the objection that it does not definitely point out the nature of the injury for which damage is sought. There may be decisions in other states—counsel cite some of them—where a contrary rule is applied, but we discover no reason for departing from the rule of the decisions of this court in the cases above cited, and we follow and apply the same. The allegation of this complaint was that plaintiff had been permanently disabled, and it is clear that an order of the court requiring the complaint to be made more definite and specific would have made it incumbent upon plaintiff to specifically allege in what the permanent disability consisted.

3. Defendants requested the court to charge the jury that since the boat belonged to defendant Lemiere, he, with defendant McKay, had the right to pursue plaintiff and retake the same, using such force as was reasonably necessary for the purpose. The court re-

fused to so charge and of this defendants complain. In this we find no error. As applied to the issues litigated, the refusal to so instruct the jury was correct. It probably is the law that the owner of personal property which has been wrongfully and unlawfully taken from him may, in a particular case, forcibly retake it from the wrongdoer, using no more force than is necessary for the purpose. In other words, that this statement may not be construed too broadly, where the owner sees a thief steal and make off with some valuable article of personal property, he may pursue the thief and retake his property, using no more force than is necessary, and not submit to the delay incident to suing out a writ of replevin. But the rule does not apply to all cases of wrongful taking of property. *Stanley v. Payne*, 78 Vt. 235, 62 Atl. 495, 3 L.R.A.(N.S.) 251, 112 Am. St. 911. Conceding that the rule in the limited application stated is the law of this state, it has no proper application to the facts here before the court. In addition to the fact that no element of theft entered into the act of plaintiff in taking the boat under the circumstances stated, the particular question was not presented by the pleadings nor was it litigated on the trial. The defense to the action was denial of the alleged assault, and it was not claimed in the answer or in the testimony of defendants that defendants or either of them were justified in committing the same for the purpose of reclaiming the boat. The defense was not one in justification, but solely in denial. In this situation the rule justifying the retaking of personal property wrongfully taken from the owner, if applicable in this state to any extent further than stated, was not involved in the issues and the court properly rejected the requested instruction.

4. Among other grounds of defendants' motion for a new trial was misconduct of the jury, by reason of which it is claimed defendants were prevented from having a fair trial. In support of the motion in this respect certain affidavits were offered which tended to show that one of the jurors, who had stated, when questioned touching his qualifications as a juror, that he did not know plaintiff, slept with plaintiff at the hotel after the verdict had been rendered, and that the same juror after the trial was seen drinking with plaintiff at a saloon. It is doubtful whether a showing of this kind, though

undisputed in essential respects, would justify the court in granting a new trial. We do not determine the question, for the charge that the juror talked or permitted others to talk to him about the case pending the trial was expressly denied. A conversation about some other case was admitted, but denied as to this case. It was also admitted that after the trial this juror became acquainted with plaintiff, "took a drink with him" and occupied the same bed at the hotel, but any prior acquaintance was denied. The affidavit, being conflicting upon the essential points tending to show misconduct, presented an issue of fact for the trial judge. We discover from the record no sufficient reason for disagreeing with his conclusion or declaring that it was an abuse of discretion to deny a new trial.

5. The other assignments of error do not require special mention. We have considered them all, with the result that no reversible error appears. The damages, though perhaps large, as reduced by the trial court seem not out of commensurate proportion to the injury complained of, and cannot be by us held excessive to the extent that a new trial should be granted. In view of the fact that the defense to the action was simply a denial of the assault, it seems clear that the court did not err in rejecting evidence offered by defendants to the effect that plaintiff had certain peculiar traits of character. Such evidence would have no tendency to discredit plaintiff as a witness or justify the assault.

Order affirmed.

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**T. JONES and Others v. ROBERT BURGESS and Another.<sup>1</sup>**

January 9, 1914.

Nos. 18,299, 18,462—(164, 265).

**False representations by seller — evidence — interest on sum demanded.**

In this action to recover damages for fraudulent representations claimed

<sup>1</sup> Reported in 144 N. W. 954.

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**Note.**— The question of implied warranty of fitness of stallions is treated in



to have been made by defendants' agents in the sale of a stallion to plaintiffs, it is *held*:

(1) The evidence sustains the verdict on the point that such fraudulent representations were made.

(2) The evidence sustains the verdict on the point that defendants sold the stallion to plaintiffs and that the persons who made the fraudulent representations were defendants' agents in making the sale.

(3) It was not error to permit one of said agents to testify that he was working for defendants, over the objections that the answer was a conclusion.

(4) Plaintiffs were entitled to interest on the amount paid for the horse as an element of damages, or a legal incident to the demand of damages in the complaint. In such case interest may be awarded though not asked for in the complaint.

Action in the district court for Grant county against Robert Burgess and Charles Burgess, copartners as Burgess & Son, to recover \$2,800. The facts are stated in the opinion. The case was tried before Flaherty, J., who denied the defendants' motion to direct a verdict in their favor, and a jury which returned a verdict for \$3,782.60 in favor of plaintiffs. Defendants' motion for a new trial was denied. From the judgment entered pursuant to the verdict, defendants appealed. Affirmed.

*Barnes & Magoon, Charles S. Cairns, George W. Beise and W. J. Black*, for appellants.

*F. W. Murphy, S. C. Anderson, E. J. Scofield and C. J. Gunderson*, for respondents.

BUNN, J.

Action to recover damages for fraudulent representations claimed to have been made by defendants' agents in the sale of a stallion to plaintiffs. The jury returned a verdict in favor of plaintiffs for \$3,782.60. Defendants' motion for a new trial was denied, judgment entered on the verdict, and this appeal taken from such judgment.

Defendants, who reside at Wenona, Illinois, are engaged in the business of buying, importing and selling Belgian and Percheron

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notes in 15 L.R.A.(N.S.) 868 and 31 L.R.A.(N.S.) 783. And for express warranty as to stallions as excluding implied warranty, see note in 33 L.R.A.(N.S.) 505.

draft horses for breeding purposes. Plaintiffs are the members of a partnership called the Herman Belgian Horse Association, organized for the purpose of purchasing, owning and managing a Belgian stallion in the vicinity of Herman, Minnesota. On or about May 8, 1905, one Norton, a horse dealer then residing at Milbank, South Dakota, appeared at Herman with a stallion; a few days later he was joined by one Hunt of Watertown, South Dakota. By exhibiting blue ribbons, and medals which they claimed the horse had won, and by representing him to be a full blood Belgian, they induced plaintiffs to purchase.

The evidence is amply sufficient to show the falsity and fraudulent character of the representations made by Norton and Hunt.

The controversy on the trial largely centered around the question whether the sale was made by Burgess & Son, acting through Norton and Hunt as their agents, or whether the sale was made by Hunt as the owner of the animal, assisted by Norton as his agent. The claim of defendants is that in April, 1905, they sold the horse to Hunt, and that Hunt, and not defendants, sold to plaintiffs. Plaintiffs' contention is that Norton and Hunt were acting as the agents of defendants in making the sale.

The claim of defendants that they did not own the horse and sell him to plaintiffs, has some nominal support in the testimony of defendant Robert Burgess that they sold the animal to Hunt in the spring of 1905; the testimony of Glass, defendants' agent at Watertown, that he turned him over to Hunt, together with the certificates of registry and pedigree, and the fact that the notes of plaintiffs given for the purchase price were made payable to Hunt. But the evidence is quite convincing that there had been no sale to Hunt, and that Hunt and Norton were acting for defendants in the transaction with plaintiffs. It is worthy of note that the answer, while it contains a general denial, does not specifically deny that defendants sold the horse to plaintiffs, and expressly alleges that "the stallion described in the \* \* \* complaint was in all things as warranted by said Robert Burgess & Son in their written warranty." On the sale Norton and Hunt procured the signatures of plaintiffs to a writing in a leather-covered book marked "Burgess & Son," which writing re-

cited: "We, the undersigned, having heretofore examined and found entirely satisfactory and as represented to us by Robert Burgess & Son, the stallion Bayard de Thy, \* \* \* do hereby purchase the said horse of Robert Burgess & Son." There was delivered to plaintiffs an instrument signed "Robert Burgess & Son (L. S.) F. S. Hunt," which recited that "we have this day sold to the Herman Belgian Horse Co. \* \* \* the imported Belgian stallion, named Bayard de Thy \* \* \* upon the following terms." While the notes of the defendant plaintiffs were payable to Hunt, they were all indorsed by him and sent to Burgess & Son. There is evidence that horses taken by Norton & Hunt in part payment for the stallion found their way into the stables of defendants. In an affidavit made by Robert Burgess in March, 1908, he swears that defendants sold the horse to Charles Glass of Watertown, South Dakota. In letters written to one of the plaintiffs in 1908, Burgess states that they sold the horse to Glass. Admittedly Glass was then defendants' agent in charge of its barns in Watertown. In addition to these rather persuasive items of proof, there is the evidence of Norton to the effect that he was in the employ of defendants in making the sale to plaintiffs, and other evidence not herein particularly mentioned. We hold not only that the verdict is amply supported by the evidence on the question whether defendants, acting through their agents, Norton & Hunt, sold the horse to plaintiffs, but that no other conclusion could well have been reached. Clearly defendants are responsible for the fraudulent representations of their agents.

It is claimed that it was error to permit Norton to testify that he was "working for" defendants in selling the horse, over the objection that it was a conclusion. This may technically have been an "opinion" of the witness. But courts are rightly breaking away from the rule that excludes opinion evidence, and multiplying the exceptions to the rule. 1 Dunnell, Minn. Dig. § 3312; 3 Wigmore, Evidence, § 1929. We approve the following statement quoted by Mr. Dunnell from Thayer on Evidence, 525: "There is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where, in the judgment of the court, it will not be helpful to the jury. \* \* \* It is obvious that such a principle must

allow a very great range of permissible difference in judgment; and that conclusions of that character ought not, usually, to be regarded as subject to review by higher courts." It was not reversible error, if error at all, to receive the testimony objected to.

It is urged that the damages are excessive. This claim is based upon the fact that the verdict is made up of the amount paid by plaintiff for the horse less its actual value as shown by the evidence, together with interest from the time of the payment. The complaint did not demand interest, and the point is made that it could not be recovered in the absence of a demand therefor in the complaint. We do not sustain this contention. Interest was recoverable as a legal incident of the demand sued on, and not by virtue of a contract therefor. In such a case it is not necessary to ask for interest in the complaint. 22 Cyc. 1574.

The assignments of error ~~not~~ covered by what we have said, and ~~not~~ waived by defendants, ~~have~~ been considered. There is no merit in any of them.

Affirmed.

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JOHN A. SWADNER v. J. FRANCIS SCHEFCIK.<sup>1</sup>

January 9, 1914.

Nos. 18,309—(167).

**Malpractice — question for jury — opinion evidence.**

In this, an action for malpractice, it is *held*:

(1) There was evidence sufficient to take the case to the jury, tending to show that certain operations performed by defendant ought not to have been performed at the time they were and under the conditions that then existed.

(2) One who is not a medical expert may testify that he had a cold, and such testimony is a sufficient basis for expert opinion evidence as to the propriety of an operation under such conditions.

<sup>1</sup> Reported in 144 N. W. 958.

Action in the district court for Hennepin county to recover \$5,-545.35 for malpractice. The case was tried before Hale, J., who denied defendant's motions to dismiss the action and to direct a verdict in his favor, and a jury which returned a verdict for \$650 in favor of plaintiff. From an order denying his motion for judgment notwithstanding the verdict and granting a new trial, defendant appealed. Affirmed.

*Briggs, Thygeson & Everall* and *Charles H. Weyl*, for appellant.

*Einar Hoidale, H. L. Hoidale* and *Ludvig Arctander*, for respondent.

BUNN, J.

This is a malpractice case. There was a verdict for plaintiff. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial. The motion was denied in so far as it asked judgment notwithstanding the verdict, but a new trial was granted. Defendant appealed from the order.

The only question before us on this appeal is whether there was evidence to take the case to the jury. Manifestly, the motion for a new trial having been granted, we cannot consider alleged errors in the admission of evidence or the sufficiency of the evidence to sustain the verdict.

Plaintiff consulted defendant for catarrh, from which he had for years been a sufferer. He testified that he had a cold, and so informed defendant. Defendant performed two operations on the nose, removing the anterior ends of the lower turbinals. After the second of these operations, a mastoid abscess appeared, and there was another operation for this. The mastoid operation left a depression in the head back of the left ear, which some months afterwards was filled with paraffin injected under the skin. The paraffin was thus injected three times, but each time sloughed out.

The first charge of improper treatment was that the first operations were performed while the patient had a severe cold, and that this was improper because of the acute inflammation in the mucous membrane lining the nasal cavity. It was claimed that defendant should have first reduced the inflammation, and that his operating

without so doing caused the mastoid abscess. The other charges relate to the manner of performing the mastoid operation, and of injecting the paraffin.

We have examined the evidence and have no difficulty in reaching the conclusion that there was evidence which justified submitting to the jury the question whether it was ordinary care and skill to perform the operations on the nose at the time and under the conditions that existed.

Plaintiff testified that he had a severe cold at the time, and that he so informed the defendant. Defendant urges that this testimony was incompetent, or at least insufficient as the basis for the opinions of the experts who testified to the impropriety of an operation under such conditions. It is true that, ordinarily, one who is not a medical expert is not permitted to diagnose his own or another's case, but we think the prohibition does not extend to testimony of this kind. One who is suffering from a cold usually knows what ails him, as do others who associate with him. It would be a technical and rather absurd rule that prevented his testifying to facts so within his own knowledge. We are satisfied that the testimony was competent, and of sufficient weight to be the basis of expert opinion. As to the medical testimony, it is sufficient to say that it made the propriety of an operation a question for the jury. We need not discuss the other features of the case.

Order affirmed.

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## INDEPENDENT SCHOOL DISTRICT OF VIRGINIA v. STATE.<sup>1</sup>

January 9, 1914.

Nos. 18,253—(27).

### **Eminent domain — appropriation of state land.**

1. State lands are not subject to appropriation in condemnation proceed-

<sup>1</sup> Reported in 144 N. W. 960.

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Note. —Upon the power to take, by the exercise of the right of eminent domain, property already devoted to a public use by a political or governmental agency, see note in 37 L.R.A.(N.S.) 101.

ings, except when the right to so acquire them is expressly or by necessary implication granted by the legislature.

**Act construed.**

2. Chapter 53, Laws 1872 (section 2606, G. S. 1894), construed and *held* to grant, by necessary implication, the right to acquire such lands for other public purposes, and the right so granted was carried forward in the statutory revision of 1905, and thereby in effect extended to all corporations entitled to exercise the right of eminent domain, including school districts.

**Appropriation of school land.**

3. Under chapter 258, Laws 1913, a duly-organized school district of the state may thus acquire an interest in and to a tract of state school land for the educational purposes, namely, experimentation and instruction in agriculture, provided for by that statute.

**Constitution not violated.**

4. Rights acquired in such condemnation proceedings are equivalent to and answer every purpose of a public sale, and the statutes, which by implication grant the right, are not in violation of article 8, § 2, of the Constitution.

The Independent School District of Virginia petitioned the district court for St. Louis county for an order adjudging that petitioner was entitled to condemn the land described in the petition, for the purpose of instruction, experimentation and demonstration in agriculture; for the appointment of commissioners to ascertain and appraise the damages occasioned by such taking and the compensation to be made to the owners and others interested in the real estate.

Notice having been given of the time and place of hearing, the state of Minnesota appeared specially and moved to set aside the attempted service upon it of the notice of hearing and to dismiss the proceedings, in so far as the state was concerned, on the grounds: (1) That the court had no jurisdiction in the premises, because the state was immune from suit without its consent, and the proceeding was an attempted suit against it brought without its consent, no permission having been granted for the bringing of it either by the legislature or by any other authorized authority; (2) that the court was without jurisdiction because the proceeding was an action at law wherein an attempt was made by an unauthorized political subdivision of the sovereign state, to-wit: An independent school dis-

trict, to take from the state without its consent public property by proceedings in eminent domain; (3) that the court was without jurisdiction, because the right did not exist in the applicant to take other than private property by proceedings in eminent domain; (4) that the court was without jurisdiction, because the proceeding was one attempting to take from the state certain of its school lands and thereby, contrary to the provisions of the state Constitution, effect the sale thereof otherwise than at public sale. The matter was heard before Dancer, J., who denied the motion to dismiss the proceedings as to the state. From the order denying the motion, the state appealed. Affirmed.

*Lyndon A. Smith*, Attorney General, and *Clifford L. Hilton*, Assistant Attorney General, for appellant.

*Arnold & Pickering*, for respondent.

BROWN, C. J.

Proceedings under the authority conferred by chapter 258, p. 355, Laws 1913, to condemn a tract of state school land for the use and benefit of Independent School District of the city of Virginia, this state, for instruction and experimentation in agriculture. The land so sought to be taken being the property of the state, notice of the proceeding was served upon the attorney general as required by section 2524, R. L. 1905. The attorney general appeared at the hearing and moved for a dismissal on the ground, among others, that the school lands of the state are not subject to condemnation for the purpose stated or otherwise, that the proceeding is one to acquire rights in such lands contrary to the provisions of the state Constitution, to the effect that no state school lands shall be sold otherwise than at public sale, (section 2, art. 8, Const.) and, therefore, that the court is without jurisdiction to entertain the proceeding. The motion was denied and the state appealed.

1. We come directly to the principal question in issue, namely, whether a tract of state school land is subject to appropriation for educational purposes by a duly-organized school district in condemnation proceedings under chapter 258, Laws 1913, for all other



incidental questions are necessarily determined by a decision of that question.

2. The generally accepted doctrine of practically all of the courts is that the public lands of the state may be taken under the power of eminent domain only when authority to do so is expressly or by necessary implication granted by the legislature. The rule is particularly applicable to lands owned and in actual use by the state, or by some of its municipal subdivisions. It is also settled law that a general grant of the right of condemnation does not include state property, whether in actual use or not, or whether held in its proprietary or other capacity, unless the state is expressly mentioned therein. *State v. Boone County*, 78 Neb. 271, 110 N. W. 629, 15 Ann. Cas. 487, and note. It is further settled that the municipalities of a state, including cities, villages, towns, counties and school districts, have no inherent power of eminent domain and can exercise it only upon express or implied legislative grant. 15 Cyc. 568. In this state the power has been conferred upon the municipalities named, and the purposes for which the power is here sought to be exercised is granted to school districts by chapter 258, *supra*. But our examination of the various pertinent statutes has brought to light no provision expressly exposing state lands to appropriation in this manner. And our first inquiry is whether it has been granted by necessary implication. If so the absence of the express grant becomes unimportant.

It is clear that no such implied grant can be spelled out of any of the statutes of the state enacted prior to 1872. But the legislature of that year apparently recognized the right as an existing one, and by necessary implication it was granted by section 15 of chapter 53 of the laws of that year. That statute was amendatory of the then existing statutes granting the general power of eminent domain to certain public service corporations and prescribing the procedure thereof, and the amendment, among other things, provided, in respect to the notice of hearing that, "in cases where the enterprise shall be located through or upon school or University lands, or any other lands belonging to this state, such notice shall be served upon the secretary of state or his assistant, and the commissioners shall

award damages to the state, in like manner as to private persons or corporations."

By this enactment, which is found unchanged in 2606, G. S. 1894, the legislature appreciated the fact that it might in particular instances be necessary to take state lands for some other public use, and for the purpose of protecting its rights in such a case required that the notice of the proceeding be served upon the secretary of state; and by the requirement that the commissioners assess damages to it in the same manner as to persons and corporations, not only recognized the right as of one of probable necessity, but by necessary implication granted the same.

The statute was in effect so construed in *In re St. Paul & N. P. Ry. Co.* 34 Minn. 227, 25 N. W. 345, where the amended statute was cited in support of the decision that university lands might be condemned for railroad purposes. The court held that since the land there involved was not used for the purposes of the University it was liable "to be appropriated in same manner as lands of private persons." The distinction between used and unused state land was further emphasized in *University of Minnesota v. St. Paul & N. P. Ry. Co.* 36 Minn. 447, 31 N. W. 936. The distinction is in accord with the general doctrine that land already devoted to a public use cannot in proceedings in eminent domain, without express or implied grant, be taken for another and inconsistent public use. So that in the light of the act of 1872 and its application in the decisions referred to, the conclusion necessarily follows, as we view the question, that the right of condemnation of state land was granted by that statute by necessary implication. We so hold.

3. However, this does not solve the whole question, for the right so granted extended at the time only to railroad and other corporations entitled under title 1 of chapter 34, General Statutes, to take private property in condemnation proceedings, for it was an amendment of and had reference to that statute only. A separate condemnation proceeding was provided in nearly all other instances where the power was granted, and this is true as to school districts. Section 6, et seq., chapter 36, G. S. 1878, and section 3653, et seq., G. S. 1894. But those statutes were all repealed by the general re-

vision of 1905, and school districts, and other municipal corporations having no special charter provisions on the subject, were required to proceed under the general eminent domain provisions by the revised laws, the same being chapter 41. The revision embodied the substance of the act of 1872, and thus carried forward the implied consent to appropriate state lands to other public purposes. While some change in the language was made by the revision commission, there was evidently no purpose to change the law in point of substance. As adopted by the revision the statute still required the state to be served with notice, and that damages be assessed to it for lands taken in such proceedings. This requirement was not expressed in the new law in the language of the old, but the provision that all land taken be assessed to the owner necessarily includes the state where its lands are involved. It is manifest, therefore, that the revision commission intended to retain the old law in its substance, and it follows as a necessary consequence that the implied right to take state lands was carried forward and extended to all condemnation proceedings.

4. No special significance is to be given to the words "private property," as found in the eminent domain statute, section 2520, R. L. 1905. Though the implied consent to take state lands is contained therein, the several sections of that chapter were intended as a statute of procedure in all condemnation proceedings, and not as one granting the right of eminent domain. In other words, the general power is not there granted, but the exercise thereof when granted by other statutes is controlled by the procedure therein set forth. The old statute embodied both a grant of power and the mode of its exercise. These were separated by the revision. The power in the case of school districts is found in other statutes and, as there granted, no limitations as to the character of the property that may be thus taken are made. The appearance of the words "private property" in the revised laws is therefore of no special importance.

5. Though there is force in the suggestion of the attorney general that a distinction might well be made between land held by the state in its proprietary capacity, and that held in trust for educational purposes, the distinction was not made in the University case, and

we are not disposed to change the rule of that decision, since for many years the legislature has permitted it to stand as an expression of the law of the state upon the subject. Nor does chapter 73, p. 121, Laws 1878, since carried forward in other editions and revisions of the general statutes, by which the right of way was expressly granted to railroad companies over school and other state lands, affect the question. That was an express grant of the right of way, and not the power to condemn. The statute was not referred to in the University case.

6. The state further contends that the constitutional provision that no school land held by the state shall be disposed of otherwise than at public sale, precludes the right of condemnation, and renders invalid any statute which may expressly or by implication grant the right, except as authorized by section 4 of article 10 of the Constitution, if that be construed as applicable to state lands, for the reason that such a proceeding does not amount to a public sale. This presents the most serious question in the case. We have given it careful consideration and decide it adversely to the state's contention. In respect to the method of sale school and university lands stand upon the same basis, for, as to the latter, the statutes fully provide for and restrict the manner and method of their disposal, and the requirements in that behalf are of equal force with the constitutional provisions as to the disposal of school land. Substantially the same question was presented in the case of *University of Minnesota v. St. Paul & N. P. Ry. Co.* 36 Minn. 447, 31 N. W. 936, and the contention of the state was not sustained. The court there differentiated between state lands in actual use and those not in use and subject to sale, holding, as to the latter, that they might be appropriated in condemnation proceedings.

We follow and apply that decision, for it seems clear that a disposal of state lands in condemnation proceedings, where the value thereof is appraised and paid substantially as in the case of a public sale, is equivalent to a sale of that character and answers every purpose of the Constitution. Every right of the state, intended to be protected by the Constitution, is as fully protected in one as in the other mode of disposal. No greater rights can be acquired in the

condemnation proceeding than under a sale by the state auditor. All mineral rights must be reserved to the state, (section 5304, G. S. 1913) and under section 5404, G. S., 1913, this and other reasonable conditions may be imposed upon rights thus acquired. So that every interest that the state may have or assert is safeguarded as fully as upon an appraisalment and sale under the general laws. In the case at bar the land in question is being taken for educational purposes, the purpose for which it was granted to the state by the Federal government. Its value as determined by the condemnation commissioners, or by the court on appeal, must be paid by the school district, and the amount thereof becomes a part of the general school fund, the income from which inures to the benefit of all school districts of the state. The result of which is that no special privilege is acquired or gained by this particular school district over other districts.

The obvious purpose of the constitutional restriction that "no portion of said lands shall be sold otherwise than at public sale," was to prevent private sales, and effectually to preclude secret transactions with speculators. In other words, the intention was to surround the disposal of the lands with publicity, thus avoiding private or secret dealings, which often result disastrously to the best interests of the state. And a reading of all the provisions of the section of the Constitution in which this restriction is found tends to the conclusion that it was contemplated that title to such lands might be acquired otherwise than at public outcry, for it is therein provided that the proceeds of the sales "or other disposition" shall become a perpetual fund for the benefit of the schools of the state. While this clause cannot be said to have been included in the Constitution with a view to possible condemnation proceedings, it can be said that it was in the mind of the framers of the instrument that the lands, or some of them, might be disposed of in the due course of law otherwise than at public auction. And we think that so long as the disposal is attended with publicity and in conformity with the requirements of the law in respect to the particular proceedings in which the title is sought to be acquired, the spirit, if not the letter, of the Constitution is complied with and not violated.

The view that neither the constitutional provisions referred to nor the statutes regulating the manner and method of the sale preclude the right of condemnation is sustained by the courts of Washington and Idaho. *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541; *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25. The Constitution of the state of Washington is substantially the same as that of this state, upon this subject, in that it provides that state lands shall be disposed of only at public sale. It was held in the case cited that a statute expressly providing for condemnation of state school land was not a violation of the Constitution for the reason, as expressed in the opinion, "that condemnation had all the elements of a public sale." Substantially the same situation was presented in the Idaho case, with the same result.

This covers all that need be said and the conclusion reached disposes of all questions raised. And for the reasons stated we hold that under chapter 258, p. 355, Laws 1913, the tract of land in question may be acquired by respondent school district for the educational purposes there prescribed.

Order affirmed.

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HOFFMAN MOTOR TRUCK COMPANY v. JOHN  
ERICKSON and Others.<sup>1</sup>

January 9, 1914.

Nos. 18,366—(171).

**Prayer for relief not controlling.**

1. Plaintiff *held* entitled to such relief, legal or equitable, as the facts proved required, regardless of the fact that such might be broader than the prayer.

**Issue of stock — action by corporation.**

2. Corporation *held* to have right to test by action the validity of a certain stock issue.

<sup>1</sup> Reported in 144 N. W. 952.

**Exchange of property for stock — excessive valuation.**

3. Where defendants, the sole owners and officers of a newly-formed corporation, issued part of its stock to themselves as fully paid, in exchange for property excessively valued, and thereafter like stock was sold by the corporation to other persons at par and for face value received, the corporation *held*, on the facts of the case, entitled neither to recover damages from defendants nor to have their shares cancelled in excess of the value of the property given therefor.

Action in the district court for Renville county to require defendants to account for stock in plaintiff corporation fraudulently obtained by them, to recover the par value of such stock, and for such other and further relief as to the court might seem just. The case was tried before Flaherty, J., who made findings and ordered judgment in favor of defendants dismissing the action. From the order denying its motion for a new trial, plaintiff appealed. Affirmed.

*Daly & Barnard*, for appellant.

*F. W. Murphy and Thomas Kneeland*, for respondents.

PHILIP E. BROWN, J.

Appeal by plaintiff from an order denying a new trial, after trial by the court and findings denying plaintiff relief.

The action is to recover from defendants as promoters the face value of stock alleged to have been issued to them by the corporation, without consideration, while they were the sole owners and officers, or for its cancelation. The general facts, stated most favorably to plaintiff, are:

Prior to December 18, 1907, defendants were copartners experimenting in building a type of automobile for market. As such they expended considerable time and money, and acquired property of various kinds, for use in the business, of value not exceeding \$3,000, but no patents. On the day stated they incorporated as a manufacturing concern under R. L. 1905, § 3068, with \$100,000 authorized capital, and were made its board of directors and only officers. At the first meeting of the corporation, held January 27, 1908, they caused to be issued to themselves in severalty shares aggregating at face value \$40,000, as fully paid, and transferred the same

to themselves on the company's books. The only consideration therefor, however, was the turning over of the partnership business and property, and these, with its stock, constituted all the assets of the corporation. Beginning November 8, 1908, and at various times thereafter before the bringing of this action, the corporation issued to persons other than defendants, like stock of face value of \$13,100, in consideration of said amount paid therefor. After incorporation and before issuance of the last mentioned stock, the company borrowed \$5,000 to commence business, and thereupon engaged in manufacturing automobiles. Defendants remained the only officers and in sole charge of the corporation until July, 1911, when they resigned and new officers were elected.

1. It is of no consequence that plaintiff's claims to be awarded equitable relief were broader than demanded in the complaint. G. S. 1913, § 7753, requires a complaint to state demand for relief desired; but where defendant appears the relief granted is in no wise limited or controlled by the prayer, except that greater damages cannot be recovered, without amendment, than stated. Plaintiff must be awarded such relief, either legal or equitable, as the facts proved required, regardless of the prayer. See annotations to the statute, and also to section 7896. Furthermore, plaintiff, if damaged, had the right to test the validity of the transactions complained of by action. Unissued corporate stock belongs to the corporation; considered as a legal person or entity; and when directors breach their trust by wrongful dealing therewith, the corporation itself is primarily interested and the proper party plaintiff. *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196, 44 N. W. 56; 2 *Pomeroy*, Eq. Jur. (2nd ed.) § 1091. And in equity the kinds and forms of specific remedies are as unlimited as the powers of such courts to shape relief awarded in accordance with the circumstances of the particular case. 1 *Pomeroy*, Eq. Jur. (2nd ed.) § 170.

2. Plaintiff now claims to be entitled either to recover the difference between the actual value of the property turned in to the corporation and the face value of the stock received by defendants therefor, or to cancel these shares to the extent of the difference. The



basis of these claims rests largely upon the provision of R. L. 1905, § 2878, that:

"No corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued."

Said Mr. Justice Bunn, in *Randall Printing Co. v. Sanitas Mineral Water Co.* 120 Minn. 268, 273, 139 N. W. 606, 608, 43 L.R.A. (N.S.) 706:

"A corporation, unless prohibited by some constitutional or statutory provision, may in good faith issue paid-up shares for the purchase of property, or for services actually rendered; but when the stock is not paid for in fact, either in money, property, or services, equity will not regard the fictitious arrangement by which it is issued as fully paid up, and will inquire into the actual transaction, including the actual value of the property or services which were received as payment."

Under this rule, if the present case turned merely upon the question of adequacy of consideration on the theory of the shares being worth par, or more than the property exchanged for them, we would find no difficulty in overturning the transaction, nor in concluding it was constructively fraudulent. But the observations quoted were made in connection with a creditor's suit, and this court, in order to protect the rights of creditors, has carefully limited the application of the statute to cases where such rights are involved, and held that shares purchased and paid for at less than par, though voidable at the suit of creditors, are, until set aside at their instance, valid between the corporation and stockholders, and also between the several stockholders. *Shaw v. Staight*, 107 Minn. 152, 157, 119 N. W. 951, 20 L.R.A.(N.S.) 1077. The rule in the *Randall* case cannot be generally applied. No rights of creditors are here involved, and actual fraud is disclaimed, but constructive fraud is relied upon. Neither of plaintiff's claims, therefore, can be sustained. This statute fixes no penalty under which a recovery of damages could be allowed, and such cannot be interpolated by construction. *Insurance Press v. Montauk Fire D. W. Co.* 103 App. Div. 472, 93 N. Y. Supp. 134, 138. Neither can an agreement for payment of the stock be declared otherwise than as made in the actual transaction.

Randall Printing Co. v. Sanitas Mineral Water Co. *supra*, 273. Courts are powerless to make contracts.

Moreover it is clear that plaintiff has suffered no damage by defendants' acts, and without this no recovery at law can be had. The corporation when organized and prior to transfer of the partnership property, had no assets other than its capital stock, and thereafter only such as were so transferred. Hence the entire capital stock had only such value as the partnership property gave it. If defendants had issued all of it to themselves in exchange for the partnership property, or even without consideration, no profit or loss would have resulted to either, and neither the corporation nor any person could have been harmed or deceived by the transaction itself. Similarly, the stock issue actually made simply evidenced the change from partnership to corporate ownership. Subsequent creditors might object as being misled. Persons thereafter purchasing stock might also have a remedy, either through estoppel or fraud, and like remedy if additional stock were sold above the \$40,000 issue in question; but these liabilities would be personal, enforceable, by rescission or otherwise, at the instance of individual purchasers against those perpetrating the wrong, in which the corporation would have no interest.

Nor is claim here made that any of the subsequent purchasers of stock were without knowledge of the facts when they purchased, or were in any way deceived. Plaintiff is not entitled to recover damages. *Old Dominion C. M. & S. Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. ed. 1025; *Insurance Press v. Montauk Fire D. W. Co.* *supra*; *Hutchinson v. Simpson*, 92 App. Div. 382, 87 N. Y. Supp. 369; *Seymour v. Spring Forest Cem. Assn.* 144 N. Y. 333, 39 N. E. 365, 26 L.R.A. 859; *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499; *Iowa Drug Co. v. Souers*, 139 Iowa, 72, 19 L.R.A.(N.S.) 115, and note. The fact that defendants were directors of the corporation when the transaction complained of occurred, is not important under the facts disclosed.

3. What has already been said concerning the right to damages, and the authorities next above cited, apply equally against the right to cancelation, and, in addition, plaintiff encounters the maxim that

those seeking equity must do it; and without rescission or restoration of the property received from the partnership, of which there is neither allegation nor proof, plaintiff under most of the authorities cannot question the sufficiency of the consideration. *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677; *Insurance Press v. Montauk Tire D. W. Co.* supra; 10 Cyc. 479. It is unnecessary, however, to approve or disapprove this latter rule. In *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L.R.A. 725, followed in *Old Dominion C. M. & S. Co. v. Bigelow*, 203 Mass. 159, 176, 89 N. E. 193, 40 L.R.A. (N.S.) 314, the contrary is held, and while these cases give some support to plaintiff's contentions, they are opposed to the great weight of authority. Plaintiff is not entitled to equitable relief.

4. Errors alleged in rulings on evidence and findings have been examined, but none of them affect the result.

Order affirmed.

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EMMA J. P. CAMPBELL v. MARTIN AARSTAD and Another.<sup>1</sup>

January 9, 1914.

Nos. 18,372—(179).

**Assault and battery — evidence inadmissible.**

1. Where, in a civil action for assault and battery, no question arises as to which party was the aggressor and the issue is defense of self or property, plaintiff's reputation for turbulence or violence, uncommunicated to defendant, is inadmissible.

**Cross-examination on collateral matters.**

2. The trial court did not abuse its discretion in allowing plaintiff to be interrogated on cross-examination as to a prior independent assault committed by her upon a third person, such being within the permissible field of examination as to collateral matters to shake credibility; but it was

<sup>1</sup> Reported in 144 N. W. 956.

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Note.—On the question of the admissibility, generally, of evidence of plaintiff's character in action for assault, see note in 14 L.R.A.(N.S.) 753.

improper to allow defendant subsequently to introduce testimony contradicting the answers so elicited.

Action in the district court for Beltrami county against Martin Aarstad and Lauritz Ask to recover \$6,000 for assault and battery. The case was tried before Stanton, J., and a jury which returned a verdict in favor of defendants. From an order denying her motion for a new trial, plaintiff appealed. Reversed.

*Montreville J. Brown*, for appellant.

*E. E. McDonald* and *Thomas Keefe*, for respondents.

PHILIP E. BROWN, J.

Plaintiff appealed from an order denying a new trial after verdict for defendants, in an action to recover damages for assault and battery, her claim being against Aarstad as principal and Ask as abettor. The former justified, charging plaintiff with unlawful interference with his real and personal property, and claimed he used no unnecessary force in protecting himself and property from injury. Ask interposed a general denial.

It appeared that plaintiff and defendant Aarstad both claimed the right to possession of, and the hay on, a meadow owned by the latter, and while he was in possession, cutting grass thereon, the former interfered with his work by seizing the reins of his horses and otherwise conducting herself so as to prevent him from continuing his work. Thereupon he laid hands on her several times, considerably bruising her. Plaintiff was the aggressor, and the case turned on the questions whether Aarstad used unnecessary force, and whether Ask incited or encouraged it. These matters were clearly for the jury, and the court so submitted them.

1. Several witnesses were permitted to testify, over the plaintiff's objections and exceptions, that her reputation for quarrelsomeness was bad, but there was no proof of knowledge thereof on the part of defendants at the time the alleged assault occurred. The jury were directed to consider this evidence. Plaintiff challenges its competency and the charge thereon.

It is a general rule of evidence that the character of parties to a

civil action is inadmissible unless directly in issue. *Hein v. Holdridge*, 78 Minn. 468, 472, 81 N. W. 522; 1 Wigmore, Ev. § 64. Where, as in the present case, no question arises as to which party was the aggressor, and the issue is defense of self or property, evidence of plaintiff's reputation for turbulence or violence, uncommunicated to defendant, is almost always, if not universally, held to come within the rule and to be inadmissible. *State v. Dumphey*, 4 Minn. 340 (438), 101 N. W. 381; *Lowe v. Ring*, 123 Wis. 107, 114 N. W. 1023; *Dannenberg v. Berkner*, 118 Ga. 885, 45 S. E. 682; *People v. Kirk*, 151 Mich. 253, 114 N. W. 1023; 1 Wigmore, Ev. § 63, n. 1, and § 64.

Courts have frequently recognized an exception under like issues when controversy exists concerning which was aggressor, and evidence both as to the fact of and the reputation for quarrelsomeness, if known to the party alleging self defense at the time of the assault, has been permitted to strengthen such claim. The reasons assigned for exclusion are that a quarrelsome person may have a good case, which should not be jeopardized by prejudice engendered by proof of his general character; and, further, that defendant's conduct could in nowise be deemed influenced by unknown facts. In *Hein v. Holdridge*, *supra*, a civil action for seduction, the general rule referred to was recognized, but an exception was declared, and defendant's reputation for chastity was held proper. The holding, however, was based largely upon the doctrine of *stare decisis*, following *Schuek v. Hagar*, 24 Minn. 339, and civil actions for simple assaults, fraud, and the like, were expressly excluded therefrom. It logically follows that this debarment requires, for similar reasons, application of the general rule, where establishment of plaintiff's bad character is attempted in any action of the class mentioned; for the same basis of relevancy exists as to both parties, namely, the unlikelihood of one possessing the character claimed doing, or refraining from, a particular act, and vice versa.

The exception to the general rule has, of necessity, also been frequently allowed in criminal, especially homicide, cases, as tending to throw light on self defense and bearing on reasonable doubt. See 1 Wigmore, Ev. § 63; 124 Am. St. 1018, note; 3 L.R.A.(N.S.)

351, note. Its dangerous character, however, is universally recognized as likely to obscure the real issues, with resulting unjust verdicts; and we are satisfied, both on authority and principle, the exception admitting it should not be extended to the present case. However, we must not be understood as outlining applications or limitations of the exception with regard to either civil or criminal actions, further than is necessary to determine the questions here involved. These matters are of great practical importance, and should be determined only after full argument.

Error resulted both in admission of this testimony and in the charge; and we cannot hold that the jury were not influenced thereby to plaintiff's prejudice.

2. Defendants were permitted, over objection, to draw from plaintiff, on cross-examination, an admission of an independent assault previously committed by her upon a third person. This occurrence was neither an issue nor relevant, having no tendency to elucidate the question of the use of excessive force. How far a party may be interrogated as to collateral matters for the purpose of shaking his credibility by injuring his character, must be left largely to the sound discretion of the trial court, with which this court will not interfere except for abuse (*State v. McCoy*, 112 Minn. 424, 427, 128 N. W. 465), which we do not find here. But the answers so elicited cannot subsequently be contradicted by the interrogating party. 3 *Dunnell*, Minn. Dig. § 10348d; *Reynolds Stephens*, Ev. Art. 130. The test of collaterality is: Would the cross-examining party be entitled to prove the fact as a part of his case tending to establish his cause of action or defense? See *George Burke Co. v. Fowler*, 4 Neb. (Unoff.) 122, 93 N. W. 760. Measured by this standard, the testimony subsequently introduced by defendants in relation to the prior assault was inadmissible, and, we may add, improper as detailing occurrences irrelevant to the litigation. See *Lowe v. Ring*, supra.

Order reversed.

Chief Justice BROWN took no part.

**NICHOLAS B. LUDOWESE v. L. H. AMIDON and Another.<sup>1</sup>**

January 9, 1914.

Nos. 18,432—(260).

**Value of bank stock — documentary evidence.**

1. The books of a bank and statements of its condition made by or under the direction of its president and general manager are competent evidence tending to prove the value of the shares of stock, and furnish a basis for expert testimony in an action against the president for the rescission of an exchange of land for such stock procured by misrepresentations of the condition of the bank, and of the actual value and book value of its shares of stock.

**Rescission of contract to exchange property.**

2. An action to rescind will lie where defendant by misrepresentations of material facts, relied on by plaintiff, accomplished the deal, without proof that plaintiff was damaged.

**Material misrepresentations.**

3. Representations that the bank was not indebted related to a material fact. And representations as to actual value of its shares of stock made by its president and general manager were not mere trade talk which an intending purchaser had no right to rely on, since he could not well acquire, even by an examination of the books, the same knowledge as the president possessed of such value.

**Uncontradicted evidence.**

4. Where a fact is proven by uncontroverted testimony the reception of some testimony in the nature of legal conclusions to prove the same fact is not reversible error.

**Burden of proving purchase in good faith.**

5. Fraudulent misrepresentations being proven in an action to rescind, the

<sup>1</sup> Reported in 144 N. W. 965.

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Note. — On the question of the right to rescind subscription to corporate stock for fraud and misrepresentation, see note in 33 L.R.A. 721. And for the measure of damages for misrepresenting value of corporate stock sold, see note in 43 L.R.A.(N.S.) 373.

The authorities on the question of possession of land by tenant as notice of title are reviewed in a note in 13 L.R.A.(N.S.) 96.

defendant, who claims title from the one guilty of the fraud, has the burden of showing himself a bona fide purchaser without notice.

**Purchase in good faith.**

6. The court found, and the proof supported the finding, that plaintiff was in possession by tenant when the defendant Rebecca received the conveyance from the defendant guilty of the misrepresentations. She made no inquiries of the tenant or of plaintiff, the landlord, as to their rights. She was ignorant of the misrepresentations having been made. Under the evidence she was not entitled to a finding that she was a good-faith purchaser without notice.

**Notice to purchaser.**

7. A tenant's possession is notice of his landlord's rights in the premises, and one who claims as a good-faith purchaser under that situation must be charged with such information as an inquiry of the landlord would have elicited.

Action in the district court for Marshall county against L. H. Amidon and Rebecca T. Amidon to cancel a conveyance from plaintiff to L. H. Amidon and one from the latter to his mother, the defendant Rebecca. The case was tried before Grindelund, J., who made findings and ordered judgment in favor of plaintiff. The court denied the motion of plaintiff and the motion of defendant Rebecca for amended findings. From orders denying separate motions for a new trial, defendants took separate appeals. Affirmed.

*A. N. Eckstrom and Case & Case*, for appellants.

*John A. Pearson and Julius J. Olson*, for respondent.

HOLT, J.

The action is to rescind an exchange of properties. Plaintiff prevailed and defendants appeal from an order denying their separate motion for a new trial.

Plaintiff, a young man of 31 years of age with limited business experience, advertised his desire to exchange land for bank stock. Defendant L. H. Amidon, the president, manager, and holder of the majority shares in Florence State Bank of Florence, South Dakota, a bank capitalized at \$10,000, responded; and on August 23, 1911, plaintiff, who was living in North Dakota, went down to Florence



to investigate. Upon his second visit to the place, September 8, 1911, an agreement to trade was made and at least partially carried out. Plaintiff was to convey a farm of 320 acres in Marshall county, Minnesota, subject to \$3,500 encumbrance and pay \$3,400 in cash or securities in exchange for 76 shares of stock in defendant's bank, the face value of the stock being \$100 a share. Plaintiff on that day delivered to defendant L. H. Amidon a deed to the land and received 46 shares of the stock. The payment to Amidon of the \$3,400 and the receipt by plaintiff of the balance of the shares was left to the future. L. H. Amidon went immediately to Lake City, this state, where his mother, the other defendant, lived, and agreed to convey the farm to her for which she canceled his past-due debt of \$4,500 and agreed to pay him \$1,500. He was to make out and record the deed to her. He returned to Florence and on September 11, 1911, executed the deed as agreed and sent it together with the deed received from plaintiff to Marshall county for record where they were both recorded at 8:30 a. m. September 13, 1911.

It also appears that when plaintiff acquired the farm in the spring of the year it was in possession of a tenant of the former owner. This tenant remained in possession until the latter part of November, 1911, when plaintiff leased to another who took possession and has ever since occupied the land. On September 23, plaintiff claims he first learned that matters concerning the bank stock had been misrepresented. At once he returned the 46 shares received and demanded a rescission. The defendant L. H. Amidon refusing, this action was immediately begun and *lis pendens* filed. Because of faulty indexing by the register of deeds plaintiff failed to learn that the son had conveyed until the following summer, when Rebecca T. Amidon was made a party defendant. She claims she paid the \$1,500, the balance of the purchase price, to the son in the spring and summer of 1912 before she knew of this action, but long after filing notice of *lis pendens*.

The complaint contained allegations of fraud and misrepresentations as to the condition of the bank and the value of the stock, inducing plaintiff to trade. The defense was that none were made; that plaintiff fully investigated for himself and dealt with his eyes open;

and that defendant Rebecca T. Amidon was a purchaser in good faith without notice.

Upon the issues the court found, among other matters not necessary to set out, that defendant L. H. Amidon falsely represented that the bank stock was worth \$125 per share, that the book value thereof was \$107 per share, and that the bank was not indebted in any sum. It is found that plaintiff relied on the representations being true in making the deal, but that these were false to the knowledge of L. H. Amidon. In fact, the bank building representing part of its capital stock was mortgaged for \$1,400, the bank was indebted on its promissory note in the sum of \$7,000 and the value of its shares of capital stock was greatly less than \$107 per share. The court also found that plaintiff returned the shares he obtained and demanded a reconveyance of the land immediately upon discovering the fraud; that the land, during all the time referred to, was in the actual possession of one John Johnson, Jr., who was, during all said time, plaintiff's tenant; and that Rebecca T. Amidon did not know of the actual fraudulent misrepresentations made by L. H. Amidon to plaintiff when the land was conveyed to her. The court directed both the deed to L. H. Amidon and the deed from him to Rebecca T. Amidon to be cancelled.

It stands admitted upon the record that the shares returned to L. H. Amidon as well as those he was to transfer have been disposed of by him and are now beyond his control. So that, even conceding technical errors in the admission of testimony, he is hardly in a position to resist rescission. But we believe the court was right in the rulings during the trial with few exceptions, and, as to these, we deem them without prejudice, because the facts to which the testimony related were established beyond controversy by other competent evidence.

We shall, however, notice generally certain alleged erroneous rulings of which appellants complain. The books of the bank and the statements of its condition for some time immediately prior to the trade, and also subsequent, were received over defendants' objection. The books and statements were properly verified as being kept or issued under the direction of L. H. Amidon. It also appeared that

those remote from September 8, 1911, tended to prove the actual condition of the bank on that date. This evidence was properly received, not only as directly bearing on the falsity of L. H. Amidon's representations, but also to serve as a basis for expert testimony as to the condition of the bank and the value of its shares of stock. That the books and statements of a bank do not alone determine the value of its stock may be conceded, for the location of the bank, the reputation of the men in charge, and other matters have a bearing. But the evidence referred to, and received, was certainly of the most reliable kind and indispensable in arriving at the value of the shares whether it be actual value or book value. It requires a good deal of assurance to assert that bank stock may intrinsically be worth more than par, when the books of the bank disclose a large depletion of its capital. The numerous assignments of error growing out of the reception of the evidence referred to, and permitting expert opinion of value based thereon, are not well taken.

The appellants are mistaken in the claim that there was no misrepresentation in regard to book value of the stock. Plaintiff testified positively that L. H. Amidon represented the book value to be \$107 per share. This is also shown by Amidon's written statements. We also conclude from counsel's contention of failure of proof, made on the oral argument, that he does not bear in mind the distinction between an action to recover damages for deceit and one to rescind because of misrepresentations. In the latter a defendant cannot successfully oppose rescission if he has misrepresented a material fact, relied on by the other party in the trade, by insisting that plaintiff has not proven damage therefrom. *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533; *Nelson v. Carlson*, 54 Minn. 90, 55 N. W. 821; *Pennington v. Roberge*, 122 Minn. 295, 142 N. W. 710.

But the contention is that the representations as to the condition of the bank and the value of the stock were mere trade talk in which a seller may indulge in exaggerated expressions of the value of the property offered for sale, without subjecting himself to actionable fraud. The assurance that the bank was not indebted, when a St. Paul

bank held its promissory note for \$7,000 secured by \$12,000 of its choicest paper, was certainly a misrepresentation of a material fact. So were the representations as to the value of the stock. *Shelton v. Healy*, 74 Conn. 265, 50 Atl. 742; *Blacknall v. Rowland*, 116 N. C. 389, 21 S. E. 296. The rule of caveat emptor is not decisive against plaintiff. Bank stock in one of the chief banks of our large cities may have an easily ascertained market value. But it is different with the stock in a country bank. The deals therein are infrequent, the tangible property of a bank, even if examined, especially by one not an expert, is difficult to estimate; its real value may be known only to the managing officers of the bank, or to those possessing knowledge of banking after a long examination of the books and commercial paper or credits of the bank. Plaintiff's means of knowledge of the condition of the bank and the value of its capital stock, after such examination as he did make, was not, and could not well be, the same as *L. H. Amidon's*, the sole manager of the bank. *Nelson v. Carlson*, *supra*; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Freeman v. F. P. Harbaugh Co.* 114 Minn. 283, 130 N. W. 1110; *Baker v. Mathew*, 137 Iowa, 410, 115 N. W. 15.

Objections to certain evidence to prove that plaintiff held possession of the farm by his tenant may have been good, on the ground that the answers called for legal conclusions. But the facts establishing such relationship were otherwise proven by undoubted competent evidence and were really not in dispute.

Upon this record plaintiff is clearly entitled to a rescission, and to restitution of the farm, provided *Rebecca T. Amidon* is not a good-faith purchaser without notice. She claimed to be such, and we think the burden of proof rested on her in that respect. *Minor v. Willoughby & Powers*, 3 Minn. 154 (225); *Fritz v. Ramspott*, 76 Minn. 489, 79 N. W. 520; *Errett v. Wheeler*, 109 Minn. 157, 123 N. W. 414, 26 L.R.A.(N.S.) 816. The situation is analogous to a negotiable instrument procured by fraud in the hands of an alleged bona fide holder. When fraud in the inception of the instrument is shown, the onus of proof is upon the holder. It is true the court found a consideration, as hereinbefore stated, and that she did not know of the actual fraudulent representations made by

her son to plaintiff when she received her deed. But the court did not find that she was a bona fide purchaser without notice of plaintiff's rights; on the contrary, the finding is that during all the time involved the land was in the actual possession of plaintiff's tenant. This was equivalent to a finding of constructive notice of plaintiff's possession and rights. There is no need of citing authorities in support of the prevailing doctrine in this country that possession is notice to purchasers of land of the possessor's rights therein and that this is applicable to a grantor who remains in possession after conveying. *Teal v. Scandinavian Am. Bank*, 114 Minn. 435, 131 N. W. 486. It is also well settled in this state ever since *Morrison v. March*, 4 Minn. 325 (422) that "the actual possession of a tenant not only protects him in the enjoyment of his term but is notice of his landlord's title." *Groff v. Ramsey*, 19 Minn. 24 (44); *Wilkins v. Bevier*, 43 Minn. 213, 45 N. W. 157, 19 Am. St. 238; *Wolf v. Zabel*, 44 Minn. 90, 46 N. W. 81; *Groff v. State Bank*, 50 Minn. 234, 52 N. W. 651, 36 Am. St. 640; see also note to *Miles v. Cooper*, 13 L.R.A.(N.S.) title, "American Rule," p. 100.

We think the finding that the tenant in possession of the farm was the tenant of plaintiff is amply supported by uncontroverted facts. It was admitted that the crops belonged to plaintiff, so that he was to receive the share going to the landlord under the lease. The grain had perhaps been cut, had not been threshed or divided. In June previous the tenant had been notified by the original lessor of the sale of the farm, and thereupon plaintiff visited the premises and arrangements were made under which the tenant agreed to look to plaintiff's agent as representing him as landlord. This was an attornment. In passing, it may be stated that the record is silent as to Rebecca's knowledge that plaintiff had ever owned the land, or that he had conveyed to her son, or that there was a tenant on the farm, except this, a duplicate of the lease, unassigned, had been handed to plaintiff by the original lessor, and by plaintiff to L. H. Amidon. It does not appear when this lease and the deed to Rebecca came into her possession. But knowing that this lease by its terms expired on March, 1912, she made no effort to take possession or disturb the possession of plaintiff's tenant, nor did she visit nor inquire about this valuable

farm, either herself or by agent, or seek to derive any income therefrom; nevertheless, she claims to have paid her son \$1,500 in June, 1912, in ignorance of the litigation pending against him since September, 1911.

It may be urged, however, that even if she had taken notice of the tenant's possession and inquired of him she would have learned nothing of the facts which went to establish plaintiff's rights to a rescission. A purchaser is only chargeable with such knowledge as a proper inquiry would furnish. He must act reasonably, however, and cannot stop on the threshold of what would most likely lead to full information. This requires not only an inquiry from the tenant but from his landlord. *Deetjen v. Richter*, 33 Kan. 410, 6 Pac. 595. "The possession of land by a party, through his tenants, is notice to all the world of his rights in the premises, and without inquiry of him no one can claim to be an innocent purchaser as against him." *Whitaker v. Miller*, 83 Ill. 381; *Mallett v. Kaehler*, 141 Ill. 70, 130 N. E. 549; *Dickey v. Lyon*, 19 Iowa, 544.

It is true that, when the deed from the son to the mother was made, plaintiff was ignorant of the fraud practised on him, so the contention is near at hand that inquiry from plaintiff would not have divulged the rights upon which he now stands. But we must assume that such inquiry would have disclosed that he was in possession and was to receive the rent in shape of crops; that only a part of the consideration had been received from him; and that, as he testified, the delivery of the deed was conditional upon an examination of the bank by an expert, selected by him, disclosing the representations as to its condition made by L. H. Amidon to be true. She did not inquire of the son how he obtained the land. Charity forbids the thought that one who by misrepresentation and deceit takes advantage of a stranger in a deal would do the same to his own mother. In this case Rebecca T. Amidon simply shut her eyes, trusting perhaps her son to take the proper precautions. A failure to make inquiry may be "regarded as an intentional avoidance of the truth which it would have disclosed." *Betts v. Letcher*, 1 S. D. 182, 194, 46 N. W. 193.

Without discussing the other assignments of error we are satis-

fied from a careful examination of the same that appellants have no just grounds for complaint.

Order affirmed.

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## MIDWAY REALTY COMPANY v. CITY OF ST. PAUL.<sup>1</sup>

January 9, 1914.

Nos. 18,493—(286).

### **Priority as between tax title and local assessment lien.**

1. A tax title based on a single forfeited sale for taxes for the years 1891, 1892, and 1902 to 1909 inclusive, is equal in right of priority with a lien based upon a St. Paul city assessment accruing in 1909, following *Gould v. City of St. Paul*, 120 Minn. 172, and *Midway Realty Co. v. City of St. Paul*, *infra*, page 300.

### **Owner cannot cut out city assessment by subsequent tax title.**

2. An owner of property cannot cut out a city assessment on his property by buying up a subsequent tax title. The evidence in this case is insufficient to sustain a finding that the intervening defendant holds an independent lien superior to the rights of the defendant city.

The Midway Realty Co. made application to the district court for Ramsey county to register title to a certain lot in defendant city. In its separate answer defendant city set up a sale of the lot to defendant to satisfy a judgment for a local improvement and the execution and delivery to defendant of a certificate of sale thereof. The case was tried before Dickson, J., who made findings and ordered judgment that the applicant was the owner in fee simple of the premises, subject to the lien of Thomas McDermott, the owner of a certain state assignment certificate for delinquent taxes for the years 1910 and 1911. From the judgment entered pursuant to the order for judgment, defendant city appealed. Reversed.

<sup>1</sup> Reported in 145 N. W. 24.

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Note.—As to the superiority of lien for special assessments over lien for taxes, see note in 30 L.R.A. (N.S.) 768.

*O. H. O'Neill*, Corporation Attorney, and *J. P. Kyle*, Assistant Corporation Attorney, for appellant.

*William G. White* and *Thomas McDermott*, for respondents.

. *HALLAM, J.*

1. The Midway Realty Co. holds under a governor's deed issued April 4, 1912, pursuant to a forfeited tax sale held November 15, 1910, for taxes for the years 1891, 1892, and 1902 to 1909 inclusive.

The city of St. Paul holds a lien based upon a local improvement assessment, the warrant for collection of which was issued November 12, 1909. The premises were sold to pay this lien June 25, 1910. The time for redemption will not expire until June 25, 1915.

Thomas McDermott, on March 27, 1913, purchased a state assignment tax certificate for taxes for the years 1910 and 1911.

Following the decision in *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293, and *Midway Realty Co. v. City of St. Paul*, *infra*, page 300, 145 N. W. 21, it is held that the taxes under which applicant claims title and the assessment lien held by the defendant city are equal in right of priority, and neither can be effective to bar the other. The title of the city under its certificate has not been perfected, and, as was explicitly stated in *Gould v. City of St. Paul*, 120 Minn. 172, 177, 139 N. W. 293, "as a lien it could only be discharged by payment."

This disposes of the case as between applicant plaintiff and defendant city. There remains to be disposed of the question of the rights of defendant McDermott.

The city contends that defendant McDermott in fact purchased this certificate in the interest of the applicant plaintiff. If such is the case, his rights could be no greater than would have been the rights of applicant plaintiff had it purchased the certificate itself. The applicant plaintiff having perfected a tax title, stands in the situation of an owner of the property. An owner of land cannot purchase a tax title and assert it as a means of avoiding the payment of city assessments lawfully chargeable against his own property.

The only evidence bearing upon the relation of defendant McDer-



mott to this property is that of the defendant himself. Reducing his testimony to narrative form, he says, in substance:

I think they were purchased in the interest of my father. I presume he is the owner. The money was turned over to me by him and I bought them for him in my own name. I don't think I investigated the condition of this title when I bought those taxes. I knew the Midway Realty Co. had an interest in it. I am related to Mr. Fitzgerald who is vice-president of the Midway Realty Co. I am a nephew by marriage. Asked "Do you hold those taxes as an adverse holder to Mr. Fitzgerald's interest?" he answered, "Why, I don't presume—I presume it is adverse so far as the legal condition is concerned, but I presume if he were to ask me to surrender them for the money I paid in, I suppose I would do it." Asked "Is there any arrangement or understanding *between you and Mr. Fitzgerald* and between your father and Mr. Fitzgerald whereby you are holding those for Mr. Fitzgerald's purposes?" he answered "I don't know as to that. I wouldn't say." He later said: "As I said before, I don't believe on account of my relation with Mr. Fitzgerald I would want to do anything at all." He purchased his tax certificate pending this litigation and then interposed an answer prepared by the attorney for the applicant Midway Realty Co. Asked if the answer was in the interest of the Midway Realty Co. he answered "I wouldn't say that." On cross-examination by the Midway Realty Co.'s attorney, the following testimony was given:

Q. "The idea which I have at the bottom of this isn't whether you paid your own money in personally for the present or for a short time—but is whether you are holding any rights antagonistic to the Realty Co."

A. "We are, so far as our rights to this property is concerned, but I will say to you that anything Mr. Fitzgerald wants within the bounds of reason he is going to get."

Q. "But the legal rights of the parties are what the papers determine?"

A. "What the papers determine."

A reading of the whole of this quite frank testimony leaves little room for doubt that the applicant plaintiff and defendant McDermott

are not really adversaries in this lawsuit. We are of the opinion that the evidence does not sustain the finding that defendant "McDermott has a first and perpetual lien \* \* \* prior and superior to the rights of the applicant and of all of the defendants in this proceeding." We are not, however, disposed to order judgment against defendant McDermott, and as to this issue a new trial is granted.

Judgment reversed and cause remanded, with directions to proceed in accordance with the views expressed in this opinion.

On January 30, 1914, the following opinion was filed:

PER CURIAM.

Defendant McDermott, on motion for reargument, takes exception to the statement in the opinion that "an owner of land cannot purchase a tax title and assert it as a means of avoiding the payment of city assessments lawfully chargeable against his property."

He cites G. S. 1913, § 2119, which gives the owner of property a right to acquire a tax title "free from any claim, lien, or incumbrance, except such right, title, interest, lien or incumbrance as such owner may be legally or equitably bound to protect against such sale, or the taxes for which such sale was made," and he argues that this statute gives to an owner under a tax title the right to rid the property of city assessment liens, by allowing the land to be sold for subsequent taxes, then himself buying the certificate of sale and perfecting title thereunder. *White v. Thomas*, 91 Minn. 395, 399, 98 N. W. 101, is cited as sustaining this contention. The court in *White v. Thomas* did not hold that under the laws existing at that time a tax-title holder might do just what defendant claims he may now do. At the time that decision was made, tax and assessment liens were not of equal rank. The assessment lien was a subordinate lien. Since that time, chapter 200, p. 255, Laws 1905, has been passed, making them of equal rank. We cannot apply the rule of *White v. Thomas* under the statute in force now. By the terms of this statute plaintiff and the city are holders of co-ordinate liens. Plaintiff's lien has matured into a title. Plaintiff, as owner under the tax title, and defendant, with its assessment lien, are now equal in rank and in right of priority. If the city's lien had ripened into a title, the two

would be tenants in common. One tenant in common never could assert a tax title against the other. Section 2119 did not change this rule. Such a case is within the exception of the statute. A "cotenant is one of the parties whom the purchaser is equitably bound to protect." *Easton v. Scofield*, 66 Minn. 425, 69 N. W. 326; *Norton v. Metropolitan L. Ins. Co.* 74 Minn. 484, 77 N. W. 298, 539. Following the analogy of these cases, it seems clear that the exception of the statute should apply here also, and that the holder of a title based upon a tax lien cannot acquire a subsequent tax title to the prejudice of the holder of the co-ordinate assessment lien, although the assessment lien has not yet ripened into a title.

Motion for reargument denied.

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## MIDWAY REALTY COMPANY v. CITY OF ST. PAUL.<sup>1</sup>

January 9, 1914.

Nos. 18,494—(287).

### Priority as between tax liens and local assessment liens.

1. Applicant holds a governor's deed, issued April 27, 1912, pursuant to a forfeited tax sale held November 13, 1911, for general taxes for the years 1896 to 1910. The city of St. Paul holds certificates issued on sale for local improvement assessments, warrants for collection of which were issued in 1900, 1901, 1907, and 1908. The time for redemption from these sales has now expired. Following *Gould v. City of St. Paul*, 120 Minn. 172, it is held: Under chapter 200, Laws 1905, general tax liens and city assessment liens are of equal rank. The general rules as to tax liens of equal rank apply. Each lien is superior to all that precede it in time. A later tax or assessment lien will take priority over all earlier liens, whether for taxes or assessments.

2. Priority as between such liens is determined as of the date of accrual of the original lien, not as of the date of sale.

<sup>1</sup> Reported in 145 N. W. 21.

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Note.—On the question of the superiority of lien for special assessments over lien for taxes, see note in 30 L.R.A. (N.S.) 768.

3. All city assessments accruing any year are equal in right of priority with the lien of taxes for that year.

4. Where land is sold at a forfeited tax sale for taxes for a number of years for an entire amount, the lien of the holder of a certificate issued on such a sale is equal in right with an assessment lien accruing in any one of those years.

5. Where title is obtained under such liens, equal in right of priority, by sale and expiration of the period of redemption, the holders thereof become by operation of law tenants in common of the property.

6. A constitutional law passed by the legislature is not against public policy. It is public policy.

The Midway Realty Co. made application to the district court for Ramsey county to register title to two lots in defendant city. In its separate answer defendant city set up four sales to defendant to satisfy as many judgments for local improvements against the premises, the execution and delivery to defendant of certificates of sale for the same, and in respect to two of the sales notice of expiration of time of redemption. The matter was tried before Dickson, J., who made findings and ordered judgment that applicant was the owner in fee simple of the premises. From the judgment entered pursuant to the order for judgment, defendant city appealed. Reversed.

*O. H. O'Neill and J. P. Kyle, Attorneys for City of St. Paul, for appellant.*

*William G. White, for respondent.*

HALLAM, J.

1. The Midway Realty Co. holds a governor's deed, issued April 27, 1912, pursuant to a forfeited tax sale held November 13, 1911, for general taxes for the years 1896 to 1910. The city of St. Paul has city assessment certificates based on local improvement assessments, the warrants for the collection of which were issued as follows: February 2, 1900, under which the premises were sold May 24, 1901; August 9, 1901, under which the premises were sold December 14, 1901; October 14, 1907, under which the premises were sold March 14, 1908; and February 26, 1908, under which the premises were sold October 3, 1908. The time for redemption from each sale expired five years after the date of sale.

We cannot distinguish this case from the case of *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293. In that case plaintiff held a governor's deed issued upon a sale made November 25, 1907, for forfeited taxes for the years 1891, 1892, and 1901 to 1906 inclusive. The city held title under a city certificate, based on an assessment the warrant for collection of which was issued in May, 1902, and the sale made November 8, 1902, and the time for redemption expired November 8, 1907. Taking the first two city certificates in this case, the parallel is exact. Both in that case and this the forfeited tax sale was for taxes accruing the same year as the city assessment, under which the city claimed, and also for years both before and after. In both cases the time of redemption from the city assessment sale had expired, and the forfeited tax sale was made thereafter and title still later matured thereunder. In the *Gould* case it was held that the parties were tenants in common of the land. It is plain that the same result must be reached here, if the *Gould* case is to be followed.

The writer of this opinion did not participate in the decision in the *Gould* case, and in a *nisi prius* case previously tried, but not appealed, expressed some views not in harmony therewith, but the decision in the *Gould* case was reached in this court after an exhaustive consideration of this subject in all its bearings, and it is adhered to and followed as determining the questions of law there involved.

Prior to 1905, the charter of the city of St. Paul provided in terms too plain to be susceptible of misunderstanding that "the lien for a local assessment is subordinate to the lien of the state for taxes levied under the general laws of the state, without reference to the time when the lien of the state accrues." *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755; *City Charter 1893*, p. 134, § 139; *Sp. Laws 1887*, p. 352, c. 7, subc. 7, § 47.

Chapter 200, p. 255, *Laws 1905*, changed this rule and provided:

"That all assessments upon real property for local improvements made or levied by the proper authorities of any city in the state, \* \* \* shall be a paramount lien upon the land upon which they are imposed from the date of the warrant issued for the collection thereof, and of equal rank with the lien of the state for taxes which have been or may be levied upon said property under the general

laws of the state; and that the general rules of law as to priority of tax liens shall apply equally to the liens of such assessments and to such liens for general taxes, with the same force and effect as though all of the liens aforesaid and all of the taxes and assessments aforesaid, were of the same general character and imposed for the same purpose and by the same authority, without regard to the priority in point of time of the attaching of either of said liens, and a sale or perfecting title under either shall not bar or extinguish the other."

It is to be borne in mind that in St. Paul local assessments are collected through city officers by proceedings separate and apart from collection of general taxes. In cities governed by general laws, local improvement assessments after they become delinquent are certified to the county auditor and are included with delinquent general taxes in all subsequent proceedings for judgment, sale and redemption. G. S. 1913, § 1418. The question of construction of the statute of 1905 was beset with some difficulties, since the act was general in its application, and it was necessary to adapt it to fit both the special system peculiar to St. Paul and the general system applicable to other cities of the state.

The conclusion reached in the Gould case as to the construction of chapter 200, p. 255, Laws 1905, may be summarized as follows:

2. General tax liens and city assessment liens are of equal rank. The general rule as to tax liens of equal rank apply. Each lien is superior to all that go before it. The lien last in time is first in right, whether it be a tax or assessment lien. A later tax lien will take priority over all earlier liens, whether for taxes or assessments. Likewise a later assessment lien will take priority over all earlier liens, whether for taxes or assessments.

3. Priority is determined by reference to the date of the inception of the tax or assessment lien, and not to the date of the sale. This proposition was long ago settled in this state. See *Wass v. Smith*, 34 Minn. 304, 25 N. W. 605; *State v. Camp*, 79 Minn. 343, 346, 82 N. W. 645; *Oakland Cemetery Assn. v. County of Ramsey*, 98 Minn. 404, 408, 108 N. W. 857, 109 N. W. 237, 116 Am. St. 377; *Minnesota Debenture Co. v. Scott*, 106 Minn. 32, 41, 119 N. W. 391.

4. All city assessment liens accruing during any year are equal in

right of priority with the lien of taxes for that year. This is inevitable in cities other than St. Paul, where delinquent taxes and assessments are collected once a year in the same proceeding, and the act is construed as conforming St. Paul assessments to the same general rule. Tax and assessment liens accruing during any one year are accordingly equal in right of priority. Tax and assessment liens accruing during a subsequent year all take priority over all tax and assessment liens of former years.

5. Where land is sold at a forfeited tax sale for taxes for a number of years, as from 1901 to 1906, for an entire amount, the lien of the holder of a certificate issued on such a sale is equal in right of priority with an assessment lien accruing in any one of those years.

6. Where the holders of liens equal in right of priority are foreclosed, that is, where title is obtained thereunder by sale and expiration of the period of redemption, the holders thereof become, by operation of law, tenants in common of the property. Foreclosure of any such lien does not cut out another lien of equal right of priority.

It is urged that some of the language in the Gould case indicating these rules of construction was *obiter*. We do not so consider it. On the contrary, we consider it all pertinent to the decision reached in the case.

7. Defendant city urges that to declare a later tax lien to be superior to an earlier city assessment lien is against public policy. If this declaration is the proper construction of this statute, then it is not a declaration against public policy. "We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy." *Julien v. Model B., L. & I. Asso.* 116 Wis. 79, 90, 92 N. W. 561, 61 L.R.A. 668. When the legislature, within its constitutional powers, declares itself, that declaration is the public policy of the state. *Borgnis v. Falk County*, 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489. Furthermore, the construction placed upon this statute in the Gould case is an application to both tax and city assessments of the rule that has been applied to tax liens in the absence of statutes by the universal consensus of judicial opinion. 2 *Cooley, Taxation*, (3d ed.) 875, 960; *Wass v. Smith*, 34 Minn. 304, 25 N. W. 605; *Oakland Cemetery Assn. v.*

County of Ramsey, 98 Minn. 404, 408, 108 N. W. 857, 109 N. W. 237, 116 Am. St. 37, and cases cited; 2 Desty, Taxation, 849. We should hesitate long before holding a rule so universally applied to be contrary to public policy.

We hold, following the Gould case, that the applicant Midway Realty Co. and the city of St. Paul are tenants in common of the property in controversy.

Judgment reversed, and case remanded with directions to proceed in accordance with the views expressed in this opinion.

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### CAROLYN E. WHITE v. CITY OF ST. PAUL.<sup>1</sup>

January 9, 1914.

Nos. 18,495—(288).

#### **Priority as between tax lien and local assessment lien.**

Under chapter 200, Laws 1905, a tax title based on taxes for 1906 to 1909, inclusive, is equal in right of priority with title based on a St. Paul city assessment lien accruing in 1906. The holders of such titles are tenants in common. Such tax title is superior to a separate city assessment lien accruing at different times during years from 1896 to 1901, and is inferior to city assessment liens accruing in 1912, following Gould v. City of St. Paul, 120 Minn. 172, and Midway Realty Co. v. City of St. Paul, *supra*, page 300.

Action in the district court for Ramsey county to determine adverse claims to a certain vacant and unoccupied lot. In its answer defendant set up eight sales to it under as many judgments for local assessments against the lot in question, and the execution and delivery to it of as many certificates of sale. The case was tried before Dickson, J., who made findings and ordered judgment that plaintiff was the owner in fee simple of the premises described and the

<sup>1</sup> Reported in 145 N. W. 25.

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Note.—For a collection of authorities on the question of superiority of lien for special assessments over lien for taxes, see note in 30 L.R.A.(N.S.) 768.



defendant had no right, title or interest in or lien upon the same, except a lien for a local assessment levied in the year 1912. From the judgment entered pursuant to the order, defendant city appealed. Reversed.

*O. H. O'Neill and J. P. Kyle, Attorneys for the City of St. Paul, for appellant.*

*William G. White, for respondent.*

HALLAM, J.

On November 1, 1910, plaintiff's assignor bought a state assignment certificate for taxes for the years 1906, 1907, 1908, and on January 6, 1911, paid the taxes for 1909. Plaintiff thereafter perfected this certificate into a tax title. The city holds separate certificates based upon local improvement assessments, the warrants for collection of which were issued at different times during 1896, 1898, 1899, 1900, 1901, 1906, 1912. Separate sales were made and the time for redemption expired on all except the last.

Following the decision in *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293, and *Midway Realty Co. v. City of St. Paul*, supra, page 300, 145 N. W. 21, it is held:

The title derived by defendant city under all assessments prior to 1906 is cut out by plaintiff's tax title.

The title derived by the city under the assessment lien that accrued in 1906 is equal in right of priority with the tax title of plaintiff, and to that extent the parties are tenants in common.

Defendant's assessment lien accruing in 1912 is a first lien and is prior to any lien or right of plaintiff.

Judgment reversed and cause remanded with directions to proceed in accordance with the views expressed in this opinion.

STATE v. PEOPLE'S ICE COMPANY.<sup>1</sup>

January 9, 1914.

Nos. 18,514, 18,515—(15, 16).

**Act constitutional.**

1. Chapter 156, Laws 1911, establishing a department of weights and measures, does not violate the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title."

**Weights and measures—evidence of intent excluded.**

2. This statute is a police regulation and changes the prior law so that intent to defraud or commit wrong is not an element of the offense of selling or exposing for sale less than the quantity represented, and the exclusion of evidence tending to show absence of such intent was not error.

Six complaints were made to the municipal court of St. Paul against defendant for violation of the weight and measure law. Defendant voluntarily came into court and pleaded not guilty. Four of the complaints were tried before Finehout, J., who found defendant guilty and sentenced it to pay a fine of \$100 in each case. The other two complaints were tried by Hanft, J., who found defendant guilty and imposed the same fine in each case. From the judgments entered pursuant to the sentence, defendant appealed in each case. Affirmed.

*J. F. Fitzpatrick and R. G. O'Malley, for appellant.*

*Lyndon A. Smith, Attorney General, O. H. O'Neill, Corporation Attorney of City of St. Paul, John A. Burns and T. W. McMeekin, Assistant Corporation Attorneys of City of St. Paul, for respondent.*

TAYLOR, C.

Defendant was convicted in the municipal court of the city of St. Paul of giving short weight in the sale of ice. Six different offenses were charged against it which by agreement were all tried together, but a separate judgment was rendered as to each offense.

<sup>1</sup> Reported in 144 N. W. 962.

Defendant appealed therefrom, and the proceedings in all six cases are presented to this court upon one record. The questions presented are substantially the same in each case.

1. The prosecution is brought under chapter 156, page 197, Laws of 1911. [G. S. 1913, §§ 4611-4623.] Defendant contends that the title of this act is not broad enough to cover the penal provision upon which the prosecution is based, and that the act is unconstitutional for that reason. Section 27, article 4, of the Constitution is: "No law shall embrace more than one subject, which shall be expressed in its title." This provision has frequently been under consideration and the rules governing its application are well established. The purpose of this provision is to prevent combining in one act, for logrolling or other improper purposes, matters pertaining to diverse and unconnected subjects; to provide for apprising the legislature and the public through the title of the act, of the general subject matter with which it deals; and to secure a separate consideration of each distinct legislative measure. *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382; *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788; *Ek v. St. Paul Permanent Loan Co.* 84 Minn. 245, 87 N. W. 844; *Atwell v. Parker*, 93 Minn. 462, 101 N. W. 946. This constitutional provision is to be construed liberally and all doubts resolved in favor of the sufficiency of the title of an act adopted by the legislature. *State v. Gut*, 13 Minn. 315 (341); *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Boyle v. Vanderhoof*, 45 Minn. 31, 47 N. W. 396; *Putnam v. City of St. Paul*, 75 Minn. 514, 78 N. W. 90; *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382; *State v. Board of Control*, 85 Minn. 165, 88 N. W. 533; *Merchants Nat. Bank v. City of East Grand Forks*, 94 Minn. 246, 102 N. W. 703; *State v. Bridgeman & Russell Co.* 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41. "The title to a statute is sufficient if it is not used as a cloak for legislating upon dissimilar matters and the subjects embraced in the enacting clause are naturally connected with the subject expressed in its title." *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788. "The insertion in a law of matters which may not be ver-

bally indicated by the title, if suggested by it, or connected with, or proper to the more full accomplishment of, the object so indicated, is held to be in accordance with its spirit." *State v. Kinsella*, 14 Minn. 395 (524). "To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject." *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382.

To the same general effect are the following:

*State v. Board of Control*, 85 Minn. 165, 88 N. W. 533, in which numerous authorities are cited; *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994; *State v. Board of Co. Commrs. of Red Lake County*, 67 Minn. 352, 69 N. W. 1083; *Ek v. St. Paul Permanent Loan Co.* 84 Minn. 245, 87 N. W. 844; *Lien v. Board of Co. Commrs. of Norman County*, 80 Minn. 58, 82 N. W. 1094; *Gaare v. Board of Co. Commrs. of Clay County*, 90 Minn. 530, 97 N. W. 422; *State v. Leland*, 91 Minn. 321, 98 N. W. 92; *State v. Boehm*, 92 Minn. 374, 100 N. W. 95; *Atwell v. Parker*, 93 Minn. 462, 101 N. W. 946; *State v. Bridgeman & Russell Co.* 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913 D, 41; *City of Crookston v. Board of Co. Commrs. of Polk County*, 79 Minn. 283, 82 N. W. 586, 79 Am. St. 453; *City of Duluth v. Abrahamson*, 96 Minn. 39, 104 N. W. 682; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526.

In *Tuttle v. Strout*, 7 Minn. 374 (465), 82 Am. Dec. 108, the title, "An act for a homestead exemption" was held sufficiently suggestive to satisfy the constitutional requirement, although the act also embraced exemptions of personal property.

In *Boyle v. Vanderhoof*, 45 Minn. 31, 47 N. W. 396, the title, "An act to fix the amount of wages of *laborers* exempt from process of attachments, garnishments, or execution," was held sufficient to

sustain an act exempting a specified amount of the wages of *any person* from such process.

In *Putnam v. City of St. Paul*, 75 Minn. 514, 78 N. W. 90, an act reorganizing the school system of the city of St. Paul and establishing the city as an independent school district took the power of levying taxes for school purposes from the school officers and conferred it upon the city council, without making any reference thereto in the title. The court held that raising money for school purposes was germane to the subject of the act, and the method by which it was accomplished was a mere detail.

In *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788, the expression, "for damages to persons injured on streets and other public grounds," in the title of an act relating to actions against municipalities, was held broad enough to apply to an injury received in the machinery of the pumping station.

In *Board of Supervisors of Ramsey County v. Heenan*, 2 Minn. 281 (330), the title, "A bill for an act to provide for township organizations," was held sufficient, although the act also provided the manner in which counties should be governed. The court saying: "It is true that this act, in the technical sense, does embrace more than one subject, and but one is expressed in its title; yet so intimately blended are they in the popular understanding, and so inseparable by general custom and adoption, that although the technical sense may bring it within the letter of the Constitution, it leaves it entirely without the spirit. There is no attempt at fraud, or the interpolation of matter foreign to the subject expressed in the title, but an honest effort to create a system of town, and through the town, county government, similar to that of other states. What is not within the spirit of a law, is not within the law, although within the letter of it."

In *Gillitt v. McCarthy*, 34 Minn. 318, 25 N. W. 637, "An act to regulate the foreclosure of real estate," was held sufficient to include the matter of redeeming from execution sales.

In *First Nat. Bank of Shakopee v. How*, 65 Minn. 187, 67 N. W. 994, under the title, "to provide for incorporation and regulation of co-operative or assessment life, endowment and casualty in-

insurance associations," a provision exempting the money to be paid to beneficiaries from seizure by execution or other process for debt was held proper.

In *State v. Board of Commrs. of Red Lake County*, 67 Minn. 352, 69 N. W. 1083, under the title, "An act to provide for the creation and organization of new counties and government of the same," provisions for the organization of towns and school districts, and for the division of existing indebtedness between the old and new counties was held proper.

In *State v. Board of Control*, 85 Minn. 165, 88 N. W. 533, under the title, "An act to create a state board of control, and to provide for the management and control of the charitable, reformatory and penal institutions of the state," it was held proper to include the state normal schools.

In *Gaare v. Board of Co. Commrs. of Clay County*, 90 Minn. 530, 97 N. W. 422, under the title, "An act to create a board of state drainage commissioners and prescribe its duties," it was held proper to require the board of county commissioners to make repairs upon the ditches established by the drainage board and to pay therefor out of the county funds.

In *State v. Leland*, 91 Minn. 321, 98 N. W. 92, the expression, "relating to receiving deposits in insolvent banks," was held sufficient to sustain penal provisions against any corporation, firm or person receiving deposits.

In *State v. Boehm*, 92 Minn. 374, 100 N. W. 95, under the title, "An act to declare certain weeds common nuisances and to provide for their destruction," it was held that a provision making it a penal offense to fail to destroy such weeds upon one's own premises was valid, although the title made no reference to a penalty.

In *State v. Bridgeman & Russell Co.* 117 Minn. 186, 134 N. W. 496, under the title, "An act to prevent unlawful discrimination in the sale of milk," it was held proper to insert penal provisions in reference to the buying of milk.

The act in controversy is entitled: "An act creating a department of weights and measures, to be under the jurisdiction of the railroad and warehouse commission, defining its duties and powers and

providing penalties for interference therewith." The provision therein to which exception is taken is: "Any person who \* \* \* shall sell or offer or expose for sale less than the quantity he represents \* \* \* shall be guilty of a misdemeanor." This same act was under consideration, and was held constitutional, as against the objection here made, in *State v. Armour & Co.* 118 Minn. 128, 136 N. W. 565, and we adhere to the views there expressed.

It appears from the title that the act is general in its character, and that no attempt is made to define or index, in the title, the details contained in the act. It does not give notice that the act is confined to a particular part or phase of the general subject, as did the title of the act considered in *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1104, but announces in general terms that it is creating a department of weights and measures. Under the rule established by the authorities hereinbefore cited, any matter germane to, or connected with the subject of, weights and measures might properly be placed under this title unless excluded therefrom by the phrase "providing penalties for interfering therewith." A complete code embracing all matters relating to weights and measures would be no more obnoxious to the constitutional provision than was the probate code considered and sustained in *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382, unless the general terms of the title be restricted by the phrase last quoted. But the rule is firmly established that all doubts are to be resolved in favor of the validity of the act, and it is fairly inferable from the title, taken as a whole, that the clause in question was not inserted for the purpose of limiting and restricting the provisions of the act to a part only of such matters as are germane to the general subject. The body of the title shows that the act is unrestricted, and broad and general in its nature, and under the rule, the act cannot be held unconstitutional on account of a possible inconsistency between the body of the title and a minor phrase therein. The word "therewith" may well be held to refer to the inhibitions contained in the act, and must be so held if necessary to sustain its validity.

In many of the cases cited the provisions of the act extended beyond the apparent limitations of the title to a greater extent than

in the case at bar. The provision to which exception is taken properly tends to accomplish the purpose of the act and to protect the public from imposition. Where the purchaser receives a less quantity than he purchases, his injury is the same, whether the diminution in quantity is brought about by the use of incorrect instrumentalities, or by the failure to properly use correct instrumentalities in determining such quantity. As said in *State v. Sharp*, 121 Minn. 381, 141 N. W. 526: "The penal provisions of this act are germane to the general subject of the act as expressed in its title."

2. The defendant is a corporation and must necessarily deal with the public through its agents and representatives. The acts of the agents and representatives upon whom the company devolved the duty of dealing with the public in its behalf, committed in the performance of such duties, are properly deemed to be the acts of the company. *New York Central & H. R. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613. The sales in question were made by the employees, to whom defendant delegated the duty of making such sales and of determining the quantities to be delivered pursuant thereto. If the company can absolve itself from liability for their acts by showing that such acts were contrary to the general rules and instructions of the company, it would greatly increase the facility with which a principal, through his servants, could evade the law. The prior law provided that "every person who shall injure or defraud another \* \* \* by knowingly delivering less than the quantity he represents," shall be guilty of a misdemeanor. Section 5115, R. L. 1905. Under this act, knowledge and intent were ingredients of the offense. Changing the law so as to omit the element of knowledge indicates that the legislature intended to eliminate the question of intent as an element of the offense. As said in reference to these two provisions in *State v. Armour & Co.* supra, [118 Minn. 131]:

"It is at once apparent, on reading this section [5115], that fraud is of its essence. On the other hand, it is equally as apparent from the reading of the act of 1911, that the things there penalized are *mala prohibita*, pure and simple, of which, in the contemplation of the law, intent to defraud or commit wrong is not an element. It



is in this difference between the two acts that, in our opinion, the purpose of the legislature in incorporating in the act of 1911 the provision in question is to be found. In other words, the legislature wished to dispense with the difficult, and often insuperable task of proving intentional wrongdoing on the part of the seller."

The case comes within the rule of *State v. Heck*, 23 Minn. 549; *State v. Welch*, 21 Minn. 22; *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L.R.A. 667; *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526. As said in the latter case: "The question of intent is not material in this class of statutory offenses. Such statutes are in the nature of police regulations and impose a penalty irrespective of intent to violate them, the object being to require a degree of diligence for the protection of the public which shall render violation impossible." Under this rule it was not error to exclude evidence that the employees who delivered the ice had been given general instructions to give full weight.

3. We think both the complaints and the evidence sufficient to sustain the several convictions and the several judgments appealed from are affirmed.

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### TROY S. MILLER v. HENNEPIN COUNTY MEDICAL SOCIETY and Others.<sup>1</sup>

January 16, 1914.

Nos. 18,258—(135).

#### **Medical society — discipline of member after acquittal in court.**

The Hennepin County Medical Society, a voluntary association of physicians and surgeons, the by-laws of which provide for the trial of a member for a criminal offense or for misconduct, and provide a penalty by discipline or expulsion, may try a member for acts which were necessarily involved in a criminal charge, tried in the district court, and of which the member was acquitted.

<sup>1</sup> Reported in 144 N. W. 1091.

Action in the district court for Hennepin county against Hennepin County Medical Society, H. H. Kimball, as its president, E. J. Huenekens, as its secretary, and the members of its board of censors to restrain defendants from proceeding with and trying plaintiff upon a charge of having performed an abortion. Plaintiff obtained an order requiring defendants to show cause why a restraining order should not be granted. The matter was heard before Dickinson, J., who denied plaintiff's application. From the order denying the application, plaintiff appealed. Affirmed.

*Farnam & Tappan*, for appellant.

*Lancaster, Simpson & Purdy*, for respondents.

DIBELL, C.

This is an appeal by the plaintiff from an order of the district court of Hennepin county granting in part and refusing in part his application for an injunction restraining the defendants from trying him for certain acts which had been involved in a criminal prosecution against him.

The defendant Hennepin County Medical Society is a voluntary association of physicians and surgeons. The other defendants are members and officers of it. The plaintiff is a member. The society has been in existence since 1859. Membership in it is highly prized and is the source of professional honor and profit.

The society has a constitution and by-laws to which each member upon becoming a member assents. The by-laws have this provision: "A member who is guilty of a criminal offense or of gross misconduct either as a physician or as a citizen, or who violates any of the provisions of this constitution and by-laws, shall be liable to censure, suspension or expulsion." Provision is made for preferring charges, for a hearing and trial, and for censure, suspension or expulsion if the charges are sustained. No other consequences follow. The member's license is not revoked nor is his right to practice affected.

On April 10, 1913, the plaintiff was acquitted in the district court of Hennepin county of the crime of manslaughter in the first degree. The indictment was based upon an alleged criminal operation.

Charges were preferred by the defendant society against the plaintiff involving the matters involved in the criminal charge. The court, on the application of the plaintiff, granted an injunction restraining the society from trying the plaintiff for the crime of which he had been acquitted, but refused to restrain it from proceeding under its constitution and by-laws to an inquiry and investigation into the plaintiff's conduct relative to the alleged criminal operation. Without determining the precise scope of the injunction it is clear that it permitted the society to consider acts involved in the criminal charge in disciplining or expelling the plaintiff.

The claim of the plaintiff is that the facts charged in the indictment cannot be made the basis for disciplining or expelling him. We know of no case which holds that a member of a voluntary association, the by-laws of which provide for the discipline or expulsion of a member for crime or misconduct inimical to its being, may interpose as a bar a former acquittal of a criminal charge involving the same acts. Sound reasoning does not support such a claim. The authorities are to the effect that a license to practice medicine may be revoked by the duly-constituted authority, and that an attorney may be disbarred by a special judicial proceeding, though the acts relied upon for the revocation or for disbarment are the same acts upon which a criminal charge, resulting in an acquittal, was based. *In re Smith*, 10 Wend. 449; *In re ———*, an attorney, 86 N. Y. 563; *People v. Mead*, 29 Colo. 344, 68 Pac. 241. And see *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L.R.A.(N.S.) 439; *People v. Weeber*, 26 Colo. 229, 57 Pac. 1079; *People v. Reid*, 151 App. Div. 324, 136 N. Y. Supp. 428. There is less justification for holding that an acquittal is a bar in the trial of a member of an unincorporated association in accordance with its by-laws to which he has assented, and where the result of sustaining the charge is no more than a severance of the relations between the association and himself. There is no reason why the plaintiff should not submit to a trial in accordance with the laws of the society.

Order affirmed.

MINNEAPOLIS PLUMBING COMPANY v. ARCADE  
INVESTMENT COMPANY.<sup>1</sup>

January 16, 1914.

Nos. 18,304—(193).

**Mechanic's lien — failure of owner to post statutory notice.**

1. Leased realty is subject to a mechanic's lien for improvements made at the instance of the lessee, where the lessor knows such are being made and, without excuse, fails to give or post the written notice of irresponsibility provided for by G. S. 1913, § 7024.

**Burden of proof.**

2. The burden of proving the giving or posting of notice is upon the defendant landowner.

**Corporate existence of defendant — absence of allegation — evidence.**

3. In an action against a corporation, the complaint need not allege defendant's corporate existence, and a denial thereof in the answer is unavailing, where it is refuted by the terms of the verification and by evidence brought out by defendant itself.

**Knowledge of corporate officer binding on corporation.**

4. Defendant corporation *held* charged with its secretary's knowledge that the improvements to its realty, covered by the lien in suit, were being made at the instance of the lessee of the property, so as to subject the same to lien under the statute.

**Amendment of settled case.**

5. Objection to amendment of the settled case *held* insufficient to present the question whether such would be precluded after perfection of the appeal.

**Amount of lien — clerical error.**

6. Slight excess in the lien account filed, due to clerical error in adding the items, *held* harmless.

<sup>1</sup> Reported in 145 N. W. 37.

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Note.—As to the power of a lessee or vendee to subject owner's interests to liens, see notes in 23 L.R.A.(N.S.) 601 and 62 L.R.A. 380.

On the general question of the effect of filing an excessive lien, see note in 29 L.R.A.(N.S.) 306.

Action in the district court for Hennepin county to recover \$202.50 for labor and material and to foreclose a lien therefor. The separate answer of defendant investment company denied that it employed plaintiff to do the work mentioned in the complaint, or that it gave any consent therefor, and alleged that if any work was done or materials furnished it was done and they were furnished at the request of defendants Neamon & Economy, sublessees. The case was tried before Leary, J., who made findings that plaintiff was entitled to judgment for \$197.50, entitled to a lien therefor upon the premises described, and that the lien of plaintiff be foreclosed by a sale of the premises. From the judgment entered pursuant to the order for judgment, defendant investment company appealed. Affirmed.

*A. C. Middelstadt*, for appellant.

*James C. Melville*, for respondent.

PHILIP E. BROWN, J.

Appeal by the Arcade Investment Co. from a judgment awarding plaintiff a mechanic's lien upon its realty and adjudging foreclosure.

In 1907, defendant, being the owner of a building in Minneapolis, leased a room therein for 10 years to one Cohen, who thereafter used it as a store until April or May, 1912, when he sublet to Neamon & Economy, who then took possession and proceeded to fit up the room as a restaurant, employing plaintiff to do the work and furnish and install sinks, lavatories, water-closet, etc., together with requisite plumbing. Pursuant to this arrangement plaintiff supplied such articles, all of which were new, and did the work, all of the value of \$222.50, and charged the same on its books to Neamon & Economy, who thereafter, at some time not disclosed by the record, paid \$25 thereon, only. In due time plaintiff filed a mechanic's lien against the realty for \$227.50, claiming, among other things, that the several items mentioned were installed with defendant's knowledge and consent.

The court found the facts substantially as stated, and, further, that the contract for furnishing articles and labor was entered into

with defendant's knowledge and consent, and the same were furnished and performed also with its consent, and constituted improvements to its property. It appeared that, prior to any installation or labor, defendant's secretary knew Neamon & Economy intended to have plaintiff do the plumbing, made no objection, and signed a permit therefor, so as to comply with the city's ordinance requiring such to be issued before installation.

1. Defendant contends that where improvements are made by a lessee, no lien therefor will attach, and that G. S. 1913, § 7024, has no application. This section is as follows:

"Whenever land is sold under an executory contract requiring the vendee to improve the same, and such contract is forfeited or surrendered after liens have attached by reason of such improvements, the title of the vendor shall be subject thereto; but he shall not be personally liable if the contract was made in good faith. When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior incumbrancers or lienors shall be deemed to have authorized such improvements, in so far as to subject their interests to liens therefor. But any person who has not authorized the same may protect his interest from such liens by serving upon the person doing work or otherwise contributing to such improvement, within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises: Provided, that as against a lessor no lien is given for repairs made by or at the instance of his lessee."

The contention is that the provision as to giving written notice that improvements are not being made at the instance of the owner, applies only as between vendor and purchaser. The contrary, however, was held in *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253, and the same doctrine recognized in *Jefferson v. Leithauser*, 60 Minn. 251, 62 N. W. 277, and *Wallinder v. Weiss*, 119 Minn. 412, 415, 138 N. W. 417. Under our statute the lien does not necessarily rest upon a contract with the owner. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. 616. Authorities holding otherwise

from states not having similar statutes are not in point. Neither is *Ryan Drug Co. v. Rowe*, 66 Minn. 480, 69 N. W. 468, nor *Forman v. St. Germain*, 81 Minn. 26, 83 N. W. 438, both depending upon entirely different facts. The burden of proving service or posting of notice rests on the owner. *McCausland v. West Duluth Land Co.* 51 Minn. 246, 53 N. W. 464. There is no showing here of either. Unexcused absence thereof, coupled with knowledge on the part of a landowner of the improvement being made, subjects the land to lien. *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926.

Nor can it be held that the articles furnished and labor performed were "for repairs," within the meaning of the statute. No repairing was done. The lien items were improvements in that they increased the value of the property. No claim is made that any of the installations are trade fixtures or removable.

3. Defendant insists, however, the complaint states no cause of action because it contains no allegation that defendant is a corporation; and, further, that as the answer expressly denies it is such, therefore the testimony to the effect that the secretary knew the improvements were being made did not establish defendant's knowledge. No allegation of defendant's corporate existence was necessary. *Holden v. Great Western Ele. Co.* 69 Minn. 527, 72 N. W. 805, 65 Am. St. 585; *Hollister v. U. S. F. & G. Co.* 84 Minn. 251, 87 N. W. 776. And while the answer does deny that defendant is a corporation, it is verified by the same person who signed the improvement permit, he therein swearing "he is one of the officers of the defendant, The Arcade Investment Company, a corporation, the secretary thereof," and, as shown at folio 39 of the paper book, defendant itself brought out the fact of its corporate existence. Its secretary's knowledge, therefore, must be imputed to defendant. *Jefferson v. Leithhauser*, supra. A corporation can gain such only through its officers and agents. Defendant's insistence that its directors or stockholders must have had knowledge cannot be sustained.

Defendant also urges that the evidence failed to show filing of the lien statement in the office of the register of deeds. The original instrument, with file marks thereon, was received in evidence, accompanied by extraneous evidence of filing. Subsequently a case was

settled showing no offer of file marks. Thereafter plaintiff moved to amend so as to show reception of due endorsement as to filing. On the hearing defendant's sole objection was on the ground that "the case has been closed and concluded and on the further ground that a settled case has been made and signed and allowed by the court." The objection was overruled and motion granted. The point is now made that the court was without power to grant relief because this appeal had then been perfected; but it cannot be sustained, the objection made below being insufficient to raise the question. The court, in any event, had the right to correct the settled case before appeal.

The evidence sustains the findings.

4. The five dollar excess in the lien account filed was due to mere clerical error in adding the items, and hence was a harmless irregularity, likewise rendered innocuous by the maxim *de minimis*.

Assignments of error not covered are without merit.

Judgment affirmed.

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## I. T. BURNSIDE v. MARY E. MOORE.<sup>1</sup>

January 16, 1914.

Nos. 18,307—(175).

### **Expiration of redemption — form of notice.**

1. The notice of expiration of the time for redemption from tax sales required to be given by chapter 270, Laws of 1905, must comply in substance with the form prescribed by section 47, chapter 2, Laws of 1902.

**Same.**

2. To redeem from a tax sale made under chapter 339, Laws of 1901, the owner must pay the subsequent delinquent taxes paid by the purchaser, and a notice of expiration of the time for redemption which does not include such taxes so paid is fatally defective.

<sup>1</sup> Reported in 145 N. W. 27.

124 M.—21.



**Same — act of 1905 — lands forfeited to the state.**

3. The limitations contained in chapter 271, Laws of 1905, apply only to tax certificates issued before the lands became forfeited to the state and to notices of expiration of the time to redeem issued thereon. The time for giving such notices as to lands forfeited to the state remained unlimited.

**Rights of purchaser of lands forfeited to the state — what law governs.**

4. The rights of the purchaser of lands, forfeited to the state for non-payment of taxes before the enactment of chapter 2, Laws of 1902, and sold to him before the Revised Laws of 1905 went into effect, are governed by the law in force prior to 1902, and, where a defective notice of the time to redeem has been given, such purchaser may give a new and proper notice and thereby perfect his title unless redemption be made.

Action in the district court for St. Louis county to determine adverse claims to vacant and unoccupied real estate. The answer alleged that defendant was the owner in fee of all the lands described in the complaint and that plaintiff had no interest therein, except a possible lien for taxes. The case was tried before Ensign, J., who made findings and ordered judgment in favor of defendant quieting title to each parcel of land described, free from any lien or interest therein on the part of plaintiff, and enjoining plaintiff from prosecuting any claim of lien for taxes or otherwise against the land. Plaintiff's motion for additional findings was denied. Plaintiff's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

*H. H. Phelps*, for appellant.

*Daniel G. Cash* and *John B. Richards*, for respondent.

**TAYLOR, C.**

This is an action to determine adverse claims to three separate parcels of real estate. Plaintiff claims under tax titles; defendant under the original or patent title. Judgment was rendered in favor of defendant and plaintiff appealed therefrom. The three tracts of land in controversy were bid in for the state at the tax sale held on May 2, 1892, for the taxes of 1890. No redemption was made and the lands became forfeited to the state. Two of the tracts were sold to plaintiff on December 28, 1905, under the law providing for the sale of such forfeited lands. In connection with these sales, no-

tice of the expiration of the time for redemption was issued and served as to both tracts. These notices were identical in form, except as to description of the land, and the first question presented is whether they were sufficient to divest the landowner of his title. They must comply with the law as it existed at the time the lands were sold to plaintiff. *Johnson v. Fraser*, 112 Minn. 126, 127 N. W. 474, 128 N. W. 676. The law then in force was chapter 270, p. 406, Laws of 1905.

Plaintiff contends that this law, which provides: "The time for redemption from any tax sale, whether made to the state or to a private person, shall not expire until notice of expiration of redemption as provided in section 47, chapter 2, Laws of 1902, shall have been given," does not require that the notice be in the form prescribed by section 47, chapter 2, p. 26, Laws of 1902, while defendant contends that it must substantially comply therewith. In *Lawton v. Barker*, 105 Minn. 102, 117 N. W. 249, it was held that a notice issued under said section 47 must give the information indicated by the form appended thereto. The statute above quoted requires the notice to be given as provided by that section, and, in the absence of any provision to the contrary, it necessarily follows that the notice must be a notice which is sufficient under that section. As the notices in question are subject to objections held fatal in *Lawton v. Barker*, *supra*, they are void and did not divest the owner of his title.

The third tract was sold to plaintiff on July 2, 1901, under and pursuant to the provisions of chapter 339, p. 557, Laws of 1901, providing for the sale of lands which had become and still remained the absolute property of the state, through judgments for "taxes of the year 1895 and prior years." Thereafter, and before giving the notice of the expiration of the time for redemption, plaintiff paid delinquent taxes on the land for years subsequent to 1895. These subsequent delinquent taxes paid by plaintiff were not included in the notice, and the question presented is whether the notice is defective by reason of such omission.

It is to be noted at the outset that the sales provided for by the law in question rest upon the judgments previously entered under

the general tax laws. No other or further judgment was contemplated. We think it clear that the act must be construed in connection with and as merely supplemental to the general tax laws. Under the general tax laws, to redeem lands not forfeited to the state, the amount paid for the tax certificate, all unpaid subsequent delinquent taxes, and all subsequent delinquent taxes paid by the holder of the tax certificate, together with interest, penalties, and costs, must be paid. Section 1602, G. S. 1894; *Midland Co. v. Eby*, 89 Minn. 27, 93 N. W. 707; *Jenswold v. Minnesota Canal Co.* 93 Minn. 382, 101 N. W. 603. To redeem lands forfeited to the state, "the amount due thereon" must be paid. "The amount due thereon" included all taxes which were past due. Section 1616, G. S. 1894; *Hoyt v. Chapin*, 85 Minn. 524, 89 N. W. 850; *Chadbourne v. Hartz*, 93 Minn. 233, 101 N. W. 68; *Olson v. Cash*, 98 Minn. 4, 107 N. W. 557. In the syllabus to *State v. Butler*, 89 Minn. 220, 94 N. W. 688, it is said: "Under a sale made pursuant to G. S. 1894, sections 1616, 1617, where the land forfeited to the state is sold for less than prior tax judgments, penalties, and costs, the amount required to redeem from such sale is the sum paid by the purchaser, with interest, costs, and subsequent taxes."

Under the law as it stood prior to the enactment of chapter 339, p. 557, Laws of 1901, where forfeited lands were sold for less than the amount chargeable against them, the owner could redeem by paying the subsequent taxes with interest upon those delinquent and the amount with interest paid by the purchaser, although such amount was less than the amount of taxes thereby extinguished. *State v. Johnson*, 83 Minn. 496, 86 N. W. 610; *State v. Butler*, supra. Chapter 339 expressly changed the rule relating to the taxes included in the sale to the purchaser, by requiring the owner, in order to redeem, to pay the full amount of such taxes, although the sale may have been made for less than that amount; but made no change in the requirement that in addition thereto he must also pay the subsequent taxes. This is apparent from the terms of the act. The manifest purpose was not to lessen but to increase the amount which the former law required the redemptioner to pay. It had long been the policy of the law to require the payment of subsequent

taxes, at least of those delinquent, in order to redeem; and the act in question, instead of indicating an intent to abandon that policy, shows plainly an intention to continue it. It discloses no intention to release any rights which the state possessed. *State v. Ward*, 79 Minn. 362, 82 N. W. 686. It provides that the lien of the state for subsequent taxes "shall in no way be affected by any sale made under the provisions of this act;" that, out of the amount paid for redemption, the amount of subsequent delinquent taxes paid by the purchaser shall be repaid to him with interest thereon; that, in case notice of expiration of redemption be given, and no redemption be made, the purchaser shall pay all subsequent taxes before recording his certificate; and that all lands bid in for the state at the sale provided for therein shall be disposed of as provided in section 1616, G. S. 1894. Redemption could not be made without paying the subsequent delinquent taxes paid by plaintiff, and the failure to include such taxes in the notice rendered it fatally defective.

It is contended that plaintiff's right to enforce his tax certificates against the land by the service of new notices is barred by chapter 271, p. 407, Laws of 1905. This law, as pointed out in *Downing v. Lucy*, 121 Minn. 301, 141 N. W. 183, is not of general application as a general statute of limitations, but "simply cuts off the right to perfect title by short foreclosure," in the cases therein specified. This law, by its terms, confines the limitations therein enacted to certificates of "tax judgment sale issued to an actual purchaser," and to state assignment certificates "issued under the provisions of section 1601 of the General Statutes of 1894," and to notices of expiration of the time for redemption issued upon such certificates. It does not purport to apply to the certificates or deeds executed upon the sale of lands forfeited to the state. It fixes the time at which the limitation shall begin to run as "the date of the tax judgment sale," pursuant to which the certificate was issued. As the notice of expiration of the period for redemption is not given, as to forfeited lands, until such lands are sold to an actual purchaser, it is apparent that this law could not well apply to such sales. If it were to apply to such sales, the right to perfect title,

as to all lands bid in for the state more than six years before its passage, would expire on January 1, 1906, and, as the purchaser acquires no lien on account of the taxes embraced in tax sales made prior to 1902, as pointed out in *Byers v. Minnesota Commercial Loan Co.* 118 Minn. 267, 136 N. W. 880, the state would find no purchasers for lands unsold on January 1, 1906, and forfeited to it under tax judgment sales which occurred more than six years prior thereto.

For many years it has been the policy of the law to remove all limitations upon the right of the state to enforce the collection of its revenues, and, in accordance therewith, the legislature carefully restricted the limitations of chapter 271 to certificates issued to purchasers before the land became forfeited to the state, and to notices of expiration of the time for redemption issued thereon. The limitations imposed did not affect lands forfeited to the state, and, as to such lands, the time for giving notice of the expiration of the time for redemption remained unlimited.

The three tracts of land in controversy were bid in for the state at the tax sale of 1892, and had become forfeited to the state prior to the passage of chapter 2 of the Laws of 1902. They were sold to plaintiff before the Revised Laws of 1905 went into effect. The provisions of chapter 2, Laws of 1902, did not apply to lands previously forfeited to the state, and plaintiff's rights are measured and determined by the prior law. *Stein v. Hanson*, 99 Minn. 387, 109 N. W. 821; *Byers v. Minnesota Commercial Loan Co.* 118 Minn. 266, 267, 136 N. W. 880; Section 936, R. L. 1905, applies to lands previously forfeited to the state, as pointed out in *Hage v. St. Paul Land & Mortgage Co.* 107 Minn. 350, 120 N. W. 298, but that section has no bearing upon the case at bar, for the reason that the sale to plaintiff had been made before it went into effect.

Under the law governing his tax titles, plaintiff has the right to give a new and proper notice of the expiration of the time for redemption, and thereby perfect his title unless redemption be made. *Byers v. Minnesota Commercial Loan Co.* 118 Minn. 266, 267, 136 N. W. 880; *Flanagan v. City of St. Paul*, 65 Minn. 347, 68 N. W. 47; *Berglund v. Graves*, 72 Minn. 148, 75 N. W. 118;

Merchants Realty Co. v. City of St. Paul, 77 Minn. 343, 79 N. W. 1040.

The printing of *as* for *is* in the printed form of the tax judgment is so obviously a typographical error that we think it should be disregarded.

Judgment reversed.

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WILLIAM P. SHIELDS v. MINNEAPOLIS, ST. PAUL,  
ROCHESTER & DUBUQUE ELECTRIC TRACTION  
COMPANY.<sup>1</sup>

January 16, 1914.

Nos. 18,320—(200).

**Duty to give passenger warning of danger — question for jury.**

1. Plaintiff was injured while riding in the baggage compartment of one of defendant's cars. He was sitting in the doorway, with his feet hanging outside. His feet came into contact with a platform of defendant. The train was overcrowded. There is evidence that defendant's trainmen directed passengers to ride in the baggage car, assented to their sitting in the doorway with their feet outside, took up tickets from them while so seated, and on one occasion cleared a place for them to sit in this manner. *Held* a question for the jury whether there was imposed on defendant a duty to warn passengers of the proximity of this platform to the track, and whether failure to give such warning was negligent. When a passenger carrier overcrowds its train beyond its seating capacity, it is bound to exercise care proportioned to the increased danger caused by such overcrowding.

**Contributory negligence.**

2. The question of plaintiff's contributory negligence was also for the jury. His conduct would under ordinary circumstances be negligent. But, where an act ordinarily negligent is done by a passenger upon the express

<sup>1</sup> Reported in 144 N. W. 1092.

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Note.—On the question of the carrier's duty to passenger on overcrowded street car, see note in 4 L.R.A.(N.S.) 399. And for injuries received on crowded railroad trains, see note in 24 L.R.A. 710.

or implied invitation of the employees in charge of the train, the passenger will not as a rule be charged with contributory negligence as a matter of law. The act of the passenger may be so obviously dangerous that even such invitation will not relieve him of contributory negligence. The act of plaintiff in this case was not so inherently dangerous that it can under all the circumstances be said to be negligent as a matter of law.

Action in the district court for Ramsey county to recover \$538 for injury received while a passenger upon defendant's train. The answer alleged that the injuries were caused solely by the negligence of plaintiff. The case was tried before Olin B. Lewis, J., who, when plaintiff rested, denied defendant's motion to dismiss the action and at the close of the testimony defendant's motion for a directed verdict in its favor, and a jury which returned a verdict for \$375 in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*M. H. Boutelle and R. T. Boardman, for appellant.*

*Willis & Cahill, for respondent.*

HALLAM, J.

On July 7, 1912, plaintiff and a party of young people took passage on defendant's train at Minneapolis, calculating to go to Antlers Park and return. On the return trip plaintiff was injured. He was riding in the baggage car and sitting with others in the doorway, with his feet hanging outside, when his feet came into contact with the platform of a station along the route. Plaintiff claims defendant's negligence caused the injury. Defendant denies negligence on its part and claims plaintiff's own negligence caused the injury. The jury found for plaintiff. The question is, does the evidence sustain the verdict?

1. First as to the negligence of defendant. Negligence presupposes a duty. Ordinarily defendant owes no duty to a passenger who sits in a baggage car with his feet exposed outside the car. *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 224, 90 N. W. 360, 1133, 57 L.R.A. 639, 91 Am. St. 345. Yet facts and circumstances may be such as to impose a duty in such a case. In this

case this car consisted of separate compartments, one for baggage, one for passengers. The passenger compartment was crowded, and there were not enough seats for all. There is evidence that the conductor had told some passengers to go into the baggage car. Certain it is that a considerable number of them rode in the baggage car with the knowledge and consent of the trainmen. The day was warm, the baggage compartment had no openings except a door on each side, and in the interior of the car the heat was excessive. There is ample evidence that, during the whole down trip and on the way back up to the time of the accident, some of plaintiff's party were continuously sitting in the doors of the baggage car in the position plaintiff occupied when injured; that the conductor knew this and took tickets from such passengers and made no objection. There is evidence that, as the train was about to return, the motorman wiped the door-sill of the baggage car and laid papers on it for passengers to sit upon, in the very place where plaintiff later sat.

The claim of negligence in this case lies in the failure to warn these passengers of the proximity of this platform to the track. We cannot say as a matter of law that defendant did not owe this duty. Defendant as a common carrier owed its passengers the duty to exercise for their safety the highest degree of care consistent with the practical operation of its train. It is the carrier's duty to provide its passengers with a seat and with a safe place to ride, and when it overcrowds a train beyond seating capacity, it is bound to exercise care proportioned to the increased danger caused by such overcrowding. *Alabama Great So. R. Co. v. Gilbert* (Ala.) 60 South. 542. The position of this platform was known to defendant. If, as plaintiff claims, defendant's passenger compartment was crowded, and passengers were invited to ride in the baggage car, and if then they were permitted, and even invited, to sit in this doorway, the only portion of the baggage car where relief from the heat could be obtained, clearly the question, whether there existed a duty to give warning of such an obstruction along the track known to defendant, was one of fact for the jury to determine.

2. The same considerations make the question of plaintiff's con-



tributory negligence one for the jury. Plaintiff was not chargeable with the high degree of care imposed upon defendant. The care of an ordinary prudent person is the measure of his duty. Ordinarily it is contributory negligence for one to ride in the door of a baggage car with any part of his body outside of the car. *Interurban Ry. and Terminal Co. v. Hancock*, 75 Oh. St. 88, 78 N. E. 964, 6 L.R.A.(N.S.) 997, 116 Am. St. 710, 8 Ann. Cas. 1036; *Knauss v. Lake Erie & W. R. Co.* 29 Ind. App. 216, 64 N. E. 95. But there are circumstances under which a person might ride in this manner without being chargeable with negligence as a matter of law. We think this is such a case. Plaintiff had a right to pay some heed to the conduct of the trainmen, and their conduct has important bearing on the question whether or not he was in the exercise of ordinary care. Where an act is done by a passenger upon the invitation, express or implied, of the trainmen, the passenger will not, as a rule, be charged with contributory negligence as a matter of law. The carrier knows far better than the passenger the dangers arising from an exposed situation and from irregular modes of travel, and the passenger is entitled to place great reliance on the invitation or assent of the carrier's servants, who are so highly charged with his protection and care. *Butler v. St. Paul & D. Ry. Co.* 59 Minn. 135, 60 N. W. 1090; *Holden v. Great Northern Ry. Co.* 103 Minn. 98, 114 N. W. 365; *Hull v. Minneapolis & S. S. M. Ry. Co.* 116 Minn. 349, 133 N. W. 852. There are many well considered decisions illustrative of this rule.

In *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, a stockman riding in a caboose was held not chargeable with contributory negligence in getting on top of the train at the direction of the conductor.

In *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149, plaintiff came into a crowded car and was directed by the conductor to move to a forward car while the train was in motion. While passing between the cars he was injured. The carrier was held responsible. See, also, *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219, a similar case.

In *Boesen v. Omaha St. Ry. Co.* 79 Neb. 381, 112 N. W. 614, plaintiff boarded a crowded street car and was directed by the conductor to stand on the running board. On reaching a switch the car was derailed and plaintiff was thrown from the car. It was held he was not guilty of contributory negligence and could recover.

Of course an act may be so obviously dangerous that a prudent man would not do it, even with the assent, approval or invitation of the trainmen. But we cannot say that plaintiff's act was of such a dangerous character that by application of this principle it can be said he was negligent as a matter of law. There is evidence that plaintiff knew that defendant had permitted its passengers to ride in the position in which he was riding and that no one had previously been injured in so doing. It cannot be said as a matter of law that plaintiff was negligent in following a practice thus countenanced by those in charge of defendant's train. *Pool v. Chicago, M. & St. P. Ry. Co.* 53 Wis. 657, 11 N. W. 15; *Jacobus v. St. Paul & C. Ry. Co.* 20 Minn. 110 (125), 18 Am. Rep. 360.

Order affirmed.

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THOMAS SANDRETTO v. CHARLES WAHLSTEN and  
Another.<sup>1</sup>

January 16, 1914.

Nos. 18,346—(221).

**Deed with inconsistent descriptions — intent of parties — construction.**

1. A deed purported to convey the portion of the grantor's land lying west of a designated county road. Its courses and distances and statement of amount conveyed would carry the grant to the east of the road. The cardinal rule of construction of contracts is to give effect to the intention of the parties. In construing a deed with inconsistent descriptions, prefer-

<sup>1</sup> Reported in 144 N. W. 1089.

ence is given to the part most likely to express the intention of the parties, and as to which there is least likelihood of mistake. The reference to the county road as a boundary is held to prevail over courses and distances and figures as to the quantity of land conveyed.

**Same — evidence.**

2. If doubt exists as to the meaning of the language of a deed, reference may be had to the circumstances attending its execution, the parties' practical construction of it, and the previous negotiations of the parties. The evidence as to such matters makes clear the actual intent of these parties to bound their grant by the county road.

Action in the district court for St. Louis county. The answer, among other matters, alleged that it was the intention of James W. Sherman, the grantor, and Gust Lee, the grantee, in a certain deed made in the year 1903 to convey and to purchase only that part of the 40-acre tract which lay west of the Tower and Embarrass road and if, as a matter of fact, the measurements were incorrect and the metes and bounds in the description covered any portion of the tract other than lands lying west of that road, the same were a mutual mistake of the parties and contrary to their intention. The foregoing allegation was denied in the reply, which alleged that plaintiff bought and Gust Lee sold 24 acres as alleged in the complaint. The case was tried before Ensign, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Reversed.

*Crassweller, Crassweller & Blu*, for appellants.

*I. Grettum*, for respondent.

HALLAM, J.

1. This is an action in ejectment. One Sherman owned 40 acres of land in St. Louis county, with a road running through it known as the Tower and Embarrass road. In 1903 he conveyed part of the land to one Gust Lee, plaintiff's grantor, by a deed, describing the tract conveyed as follows:

"Commencing at the northwest corner of the southeast quarter of the northwest quarter of section eight (8), of township sixty-one

(61) of range fifteen (15) west, thence running east on the north line of said S. E.  $\frac{1}{4}$  forty-eight (48) rods, thence in a southerly direction eighty (80) rods to a point on the south line of said southeast quarter forty-eight (48) rods east of the southwest corner of said southeast quarter, thence west forty-eight (48) rods to the southwest corner of said southeast quarter, thence north on the west line to point of beginning, the same being that part of said southeast quarter being and lying west of the public highway, known as the Tower and Embarrass road, containing twenty-four acres." Lee conveyed to plaintiff by the same description.

In 1909 Sherman conveyed the balance of the land to defendants by deed, describing it as "the easterly sixteen (16) acres" of said forty, being the whole thereof, "excepting the land conveyed to Gust Lee."

The case turns on the construction of the first deed. As a matter of fact the metes and bounds and the designation "twenty-four (24) acres" contained in this deed carry the east boundary of the land conveyed clear across the Tower and Embarrass road, and, if these figures are to be followed, plaintiff acquired not only the land on the west side of the road, but also a narrow strip on the east side of the road. In other words, the description of the land as "lying west of the public highway, known as the Tower and Embarrass road" conflicts with the courses and distances, and also with the recital as to the quantity of land conveyed.

It seems clear that the description of the land as "lying west of the public highway" must prevail, and that the figures must give way. The cardinal rule of construction of deeds is to ascertain and give effect to the intention of the parties. *Witt v. St. Paul & N. P. Ry. Co.* 38 Minn. 122, 127, 35 N. W. 862. In construing a deed with inconsistent descriptions, courts will give preference to the part which is most likely to express the intention of the parties and as to which there is least likelihood of mistake. For this reason a reference to a monument in a deed, such as a county road, will usually prevail over courses and distances and figures as to quantity of land conveyed. *Newell, Ejectment*, p. 547, § 14; *Bellows v. Jewell*, 60 N. H. 420; *Smith v. Negbauer*, 42

N. J. L. 305. There is less likelihood that the parties will be mistaken as to which side of a county road the land lies than as to the dimensions and quantity of the land.

2. If there is any doubt as to the matter, then, in resolving such doubt, we may consider the facts and circumstances attending the execution of the deed, the practical construction of the deed by the parties and their grantees, and the preliminary negotiations of the parties. *United States v. Bethlehem Steel Co.* 205 U. S. 105, 118, 27 Sup. Ct. 450, 51 L. ed. 731; *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76; *Mason v. Ryus*, 26 Kan. 464. A reference to these matters leaves no doubt as to the actual intent of the parties. They negotiated for the land west of the road, and no more, and they requested a scrivener to so draw the deed. Upon his suggestion that a road was not a satisfactory boundary line, since it might be changed, the grantor undertook to measure the tract. He measured the north line, and his crude measurement showed this line to be 48 rods from the northwest corner to the center of the road. These figures were accordingly inserted in the deed. For years the parties to the original deed recognized the road as their boundary. Not until years after did any party concerned claim that the deed conveyed anything beyond the road. At the time the deed was given, the grantor was occupying the land on the east side of the road, and a conveyance of this strip, inconsequential to his grantee, would have cut him off from all access to the road. Clearly the parties intended no such result. They intended to bound the grant on the east by the Tower and Embarrass road.

Judgment reversed, with directions to proceed in accordance with this opinion.

**CLAUS F. EKBLAW v. RAYMOND NELSON and Another.<sup>1</sup>**

January 16, 1914.

Nos. 18,404—(210).

**Delivery of deed.**

1. The evidence sustains the special verdict that a deed was delivered by the grantor to the grantees.

**Reservation in deed — passing of title.**

2. A warranty deed, containing the provision that the grantor shall remain in full possession and ownership of the premises conveyed during his lifetime, and that the deed should not be recorded until after his death, passed the title to the grantees subject to an estate for life in the grantor.

**Evidence of estoppel.**

3. Such deed was not signed by the grantor's wife and was void as to the homestead included therein. The record contains no evidence of acts or words of the grantor influencing the conduct of the grantees so as to create title in them by estoppel.

Action in the district court for Polk county by the administrator of the estate of John Ekblaw, deceased, against Raymond Nelson and Rolland Nelson to recover possession of certain real estate and \$600, the value of the use and occupation of the same. The case was tried before Watts, J., who denied motions for verdicts in favor of plaintiff and defendants respectively, and a jury which returned a verdict that plaintiff was entitled to the possession of the east half of the premises, but that defendants were entitled to the possession of the west half. Defendants' motion to set aside so much of the verdict as awarded the possession of the east half to plaintiff and for judgment notwithstanding the verdict in favor of defendants for the recovery of the whole tract, was denied. The motion of plaintiff to set aside so much of the verdict as awarded the possession of the west half to the defendants and for judgment notwithstanding the verdict in favor of plaintiff for the recovery of pos-

<sup>1</sup> Reported in 144 N. W. 1094.

session of the whole tract, was denied. From the judgment entered pursuant to the verdict, plaintiffs and defendants appealed. Affirmed.

*Charles Loring and G. A. Youngquist, for plaintiff.*

*A. A. Miller, for defendants.*

HOLT, J.

In 1902 a widow, the mother of defendants, then boys of the age of 9 and 7 years, respectively, married John Ekblaw. Soon thereafter this family moved onto a quarter section of land near Crookston, Minnesota. In 1904 Mr. Ekblaw was erecting a barn on the place and needed some money. His wife let him have about \$1,000 for that purpose. Two years later she became very ill and evidently disturbed as to the future of her boys in case of her death. Ekblaw then went to Crookston, caused a deed to be drawn and executed by himself alone, conveying the quarter section to defendants. The deed was the short form warranty, but contained the following clause: "Said John Ekblaw, party of the first part, to remain in full possession and ownership of said described real estate during his (said grantor's) lifetime and this deed not to be placed on record until after the death of said John Ekblaw, party of the first part." On his return he gave the deed to his wife. She read it, and then handed it to the mother of the boys' father, with the request that she take care of it until John Ekblaw was dead. Shortly thereafter Mrs. Ekblaw died. The defendants continued to live with their stepfather and assisted in running the farm until his death in 1909. Ekblaw had no children. The east half of this quarter section was his homestead during all the time after he moved upon it in 1902. This action is by the administrator of his estate for the possession of the land, the defendants having retained possession. The court instructed the jury that plaintiff was entitled to recover possession of the homestead, or east half of the land, and further, if the deed had been delivered to defendants, they were entitled to possession of the other half. Judgment was entered upon the verdict that plaintiff was entitled to possession of the east half and defendants to the west half of the quarter section. Both parties appeal.

The only question litigated at the trial was the effect of the deed from John Ekblaw to defendants. Plaintiff contends there was no delivery of the deed; that, even so, it is not a conveyance, but an abortive testamentary disposition of property, and, in any event, the deed is void as to the homestead. Defendants, conceding that the deed was ineffective to pass title to the homestead when it was executed, claim that John Ekblaw estopped himself from denying its validity and plaintiff is concluded thereby.

By special verdict the jury found that before his death John Ekblaw delivered the deed to defendants. The evidence sustains the finding. The situation surrounding the transaction and the relation of the members of the family to each other plainly indicate that it was the purpose of John Ekblaw, when he gave the deed into the hands of his wife, to make a delivery thereof to her for defendants. And even if it was not to be delivered to defendants until after his death it was a good delivery. *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631; *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155.

We agree with the trial court in the conclusion that the deed is a conveyance of a present estate and not an attempted testamentary disposition of property. The intention to convey the fee, reserving to the grantor a life estate, is readily seen. The language used to express such intention is not the most apt, perhaps, but its meaning is reasonably clear. If the word "ownership" had been omitted, no dispute could well have arisen. But full possession and ownership is as accurately descriptive of a person's tenure in a life estate as of one in fee simple. The meaning of a word or term is often qualified by the context. And in contracts that meaning must be adopted which sustains, and not the one which destroys or renders purposeless, the instrument. The meaning of words and expressions is to be gleaned primarily from the document itself, but in case of ambiguity resort may also be had to surrounding circumstances. No provision is contained in this deed postponing its taking effect; the contrary may be inferred from the fact that the recording of it is the only matter which is in terms postponed.



In each of the cases cited by plaintiff, language was made use of in the deed which clearly postponed the grant, or the effect of the conveyance, until the death of the grantor. *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522; *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367.

In *Vessey v. Dwyer*, 116 Minn. 245, 133 N. W. 613, the deed provided: "This conveyance and the title of said second parties to the above described lands to take only upon the death of said first party; and this conveyance is made only upon the covenant and agreement between all said parties that said first party shall continue to own and occupy said land as her own during her natural life, and said first party hereby reserves to herself the use, occupation, rents, and profits of all said described land during her natural life." The deed was held to convey the fee, reserving a life estate in the grantor. See also: *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610; *Dismukes v. Parrott*, 56 Ga. 513; *Blanchard v. Morey*, 56 Vt. 170. It will be seen that the language of the deed in the *Vessey* case attempts to postpone the grant, and the decision accords with many other authorities which hold that, even if a deed in express terms specifies that it is not to take effect until the grantor's death, it nevertheless conveys a present interest and is not to be considered testamentary in character. *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Abbott v. Holway*, 72 Me. 298; *Shackelton v. Seabee*, 86 Ill. 616; *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. 213.

We entertain no doubt of John Ekblaw's intent to convey the whole farm to defendants and that he died in the belief that he had so done. But unfortunately he failed to have his wife join in the deed and therefore it was and is void as to the homestead. *Murphy v. Renner*, 99 Minn. 348, 109 N. W. 593, 8 L.R.A.(N.S.) 565, 116 Am. St. 418, and cases there cited. This is conceded. However defendants contend that John Ekblaw was estopped to deny its validity and so is plaintiff. The evidence disclosed no act of Ekblaw creating an estoppel. The mere giving of the deed cannot be so construed. There is no evidence that defendants parted with anything, or surrendered any rights, or placed themselves in

any worse position, because of anything said or done by their step-father with reference to the homestead. Ekblaw never abandoned the land as a homestead or surrendered possession while he lived. The only authority which defendants cite, *Lucy v. Lucy*, 107 Minn. 432, 120 N. W. 754, 131 Am. St. 502, is not in point. There the grantor subsequent to making the deed abandoned the premises as a homestead and gave complete possession to the grantee. The latter was to make some payments during the grantor's life. Afterwards, when a misunderstanding arose as to these, the grantor sued the grantee and obtained judgment reforming the deed so as to embody provisions for the payment of the annuities to the former and other conditions. These the latter thereafter paid and performed. It was held that a subsequent grantee, taking with full knowledge of these facts, was estopped from asserting title as against the first grantee in possession under the deed and judgment mentioned, although the grantor's insane wife was not party to either. There are no similar facts in the case at bar upon which to predicate an estoppel.

Judgment affirmed.

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## KATE TRUAN v. LONDON GUARANTEE & ACCIDENT COMPANY.<sup>1</sup>

January 16, 1914.

Nos. 18,409—(176).

### Garnishment.

A guarantee insurance company *held* not liable as garnishee upon a judgment against the assured on an indemnified risk, where, at the time of service of the garnishee summons and when disclosure was made, it held a valid claim for policy premiums against assured in excess of such judgment, though it defended the main action, the rule of *Patterson v. Adan*, 119 Minn. 308, being inapplicable.

<sup>1</sup> Reported in 145 N. W. 26.

The London Guarantee & Accident Co., Ltd., was summoned as garnishee in an action in the district court for St. Louis county, wherein defendant Kate Truan recovered judgment against the Range Power Co. The disclosure was taken before Hughes, J., and plaintiff's motion for judgment against the garnishee for the amount of her judgment was granted. From the judgment entered pursuant to the order for judgment, the garnishee appealed. Reversed.

*Alexander Marshall*, for appellant.

*Austin & Austin*, for respondent.

PHILIP E. BROWN, J.

Appeal by the garnishee from a judgment adjudging a recovery against it in plaintiff's favor.

The facts are undisputed. Those material are: On June 5, 1910, the garnishee issued a policy, agreeing to indemnify defendant against loss from liability imposed by law upon it for damages on account of bodily injuries accidentally suffered by any person or persons not employed by assured during the year following, to the extent of \$5,000. The instrument contained the usual undertaking to defend, in assured's name and behalf, suits brought against it for recoveries contemplated by the policy, payment of costs, and provided no action should lie against the assurer for any loss thereunder, unless brought by assured for loss actually sustained after payment thereof by it in money, all substantially as set out in the policy considered in *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281. Assured stipulated therein to pay premiums calculated at the rate of  $4\frac{1}{2}$  per cent on the entire compensation earned by its employees during the period of the policy, estimated at \$142.50, and, further, if at the end of such period the entire compensation exceeded this estimate, then assured would immediately pay the additional premium earned. Plaintiff obtained judgment against defendant for \$452.41, in an action, commenced September 8, 1911, to recover \$20,000, grounded on an accident indemnified by the policy and occurring during its life, the defense whereof was conducted by the garnishee in the name and behalf of assured, but

at its own cost and expense, though the latter became insolvent and its effects passed into the hands of a receiver July 26, 1911, upon whose appointment a renewal issued June 5, 1911, was cancelled. Plaintiff, after return of execution unsatisfied, garnished appellant, and the facts stated were disclosed. Appellant, however, denied liability, and it appeared that, at the time of service of the garnishee summons and disclosure, defendant was indebted to it, for unpaid premiums on the original policy, in the sum of \$815.16. Judgment was subsequently entered against the garnishee on the disclosure for the amount of plaintiff's judgment, and this appeal followed.

No claim is made by appellant that the legal relations of the parties were in any wise affected by the receivership. The question involved is: As to plaintiff, was the garnishee indebted to defendant under the facts disclosed? Relying mainly upon *Patterson v. Adan*, supra, plaintiff insists on an affirmative answer, contending assurer's assumption and conduction of the defense in the main action imposed a liability to pay the judgment recovered, notwithstanding defendant's indebtedness to it in a greater amount for unpaid premiums on the policy in force at the time of the accident. As pointed out by Mr. Justice Bunn, in *Butler Bros. v. American Fidelity Co.* 120 Minn. 157, 164, 139 N. W. 355, 358, referring to the *Adan* case:

"The question \* \* \* was whether the insurer was liable to pay the amount of a judgment rendered against the insured after a trial of the issue, but before the insured had paid such judgment."

This court held in the case referred to that the assurer could not take sole charge of the defense of an action seeking a recovery indemnified by the policy, to the exclusion of the assured, according to its right thereunder, and, after judgment entered against defendant, deny obligation to pay assured the amount thereof, not exceeding, however, the limit of liability stipulated in the policy, and also that the sum payable could be recovered in garnishment proceedings instituted by plaintiff—the fact of defendant's nonpayment of the judgment being regarded neither as a contingency nor condition precedent to its liability therein. Notwithstanding ap-

pellant's vigorous argument to the contrary, it is difficult to assign reasons, aside from those of a technical character, for holding otherwise. Defendant's insolvency in the present case illustrates the propriety of the rule; for under such circumstances assurer would otherwise often escape liability, simply because of assured's inability to pay the judgment. No fair purpose can be subserved, as between parties to the policy, by the useless circuitry of requiring assured first to pay the judgment with its money and the assurer forthwith to reimburse. But the general language of the opinion must be taken as confined, and as intended by the court to be confined and applicable, to a determination of the particular questions involved (*State v. Johnson*, 111 Minn. 255, 262, 126 N. W. 1074), and these clearly did not include the present inquiry. Plaintiff was not a party to the contract, and by its terms the amount of the premiums could be ascertained only at termination of the policy period. She can neither object to the stipulation in this regard, nor complain because the assurer, who was under no legal obligation to her to do either, failed to collect or declined to file a claim therefor with the receiver. If defendant had paid the judgment and sued the garnishee, beyond doubt the latter could have offset its claim for unpaid premiums. It would be unjust to penalize the assurer and deprive it of this right, merely because it exercised a further contractual right in defending the action, for the outcome of which it might be held responsible and where the verdict was for one-fiftieth of the amount demanded, thus placing it in a worse position than it would have occupied had defendant paid the judgment in accordance with the strict terms of the policy. This cannot be done. See *Bacon v. Felthous*, 103 Minn. 387, 390, 115 N. W. 205. Moreover, insistence on its claim to offset is not an assertion inconsistent with the obligation assumed in defending the action because, among other reasons, a much larger verdict could have been returned under the allegations of the complaint. We hold the assurer was not indebted to defendant at the time of garnishment.

Judgment reversed.

JOSEPH RESNIKOFF v. LOUIS FRIEDMAN.<sup>1</sup>

January 16, 1914.

Nos. 18,430—(199)

**Use of independent contractor's scaffold — duty of defendant.**

Plaintiff was injured by the breaking of one of the timbers in a scaffold erected by carpenters in the construction of a house under a contract with defendant. Plaintiff had entered into a contract with defendant to furnish and put in place the tin valleys and gutters for the house at a specified price, and was injured while using the scaffold in the performance of his contract. It is *held*:

(1) The relation of master and servant did not exist between plaintiff and defendant, and the rule of safe place to work does not apply.

(2) Defendant owed plaintiff the duty of exercising ordinary care to avoid injuring him. The scaffold was erected by the carpenters, who were not servants of defendant, but independent contractors. The rule of *respondeat superior* does not apply. Defendant did not select the timber that went into the scaffold, but it was selected by the carpenters out of the timber furnished by defendant for the erection of the house. Defendant was not bound to inspect the timber so selected by the carpenters for the scaffold, and was not guilty of a breach of his duty to use ordinary care to avoid injuring plaintiff.

Action in the district court for Ramsey county to recover \$5,250 for injury received while in the employ of defendant. The answer admitted a contract between plaintiff and defendant by the terms of which plaintiff agreed for a stipulated price to construct certain tin eaves upon a certain building, and alleged that, if plaintiff met with any accident, it was occasioned solely by reason of his negligence in the premises. The case was tried before Catlin, J., who granted de-

<sup>1</sup> Reported in 144 N. W. 1095.

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Note.—The question of the liability of a master to a servant for failure to provide independent contractor with safe appliances is treated in a note in 1 L.R.A.(N.S.) 283. And for the general rule as to the absence of the master's liability for acts of independent contractor, see elaborate note in 65 L.R.A. 622.

fendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*W. R. Duxbury, C. N. Conzett and Lyle Pettijohn*, for appellant.  
*Otis & Otis*, for respondent.

BUNN, J.

This action was brought to recover damages for personal injuries. At the close of the evidence the court directed a verdict for the defendant. A motion for a new trial was denied, and plaintiff appealed from the order.

The sole question for our decision is whether or not the trial court was right in taking the case from the jury. The material facts are not in dispute, and are in substance as follows:

A sister of defendant owned a lot in St. Paul, and authorized defendant to build thereon for her a duplex house. Defendant entered into a contract with stone masons to build the foundation, another contract with two carpenters for the carpenter work, another contract for the plumbing. In short, defendant had no connection with the construction of the building, except to let the various contracts, and to furnish material as hereinafter mentioned. Plaintiff was a tinning and roofing contractor. He and defendant entered into an oral contract, by the terms of which plaintiff was to construct and put in place the tin valleys and gutters for the building at an agreed price of so much per foot. Plaintiff went to the building to begin the job. The carpenter was not quite ready for him, as he had not put on pieces or strips of board that are necessary before the tin is put on. Plaintiff assisted the carpenter in putting the strips on the south side of the building, using a scaffolding that had been erected by the carpenters. He then went down to bend the pipe in shape for the south side. After doing this, in order to measure the roof on the north side, he attempted to step on the scaffold through a window, when a two by four gave way under his weight, and he fell to the ground and sustained the injuries complained of. There was evidence that the timber which broke was a part of the platform of the scaffolding, and had a knot in it which caused it to break when plaintiff stepped on it.

The scaffold used by the plaintiff in performing his work was constructed for their own purposes by the carpenters who had the contract with defendant for doing the carpenter work on the building. Under this contract, the carpenters were to furnish all carpenter labor for the construction of the house for \$600. It was agreed that defendant was to furnish "all materials of all kinds for the erection of above house." Defendant had nothing to do with putting up the scaffolding, or with selecting the timber which went into it.

Plaintiff claims that defendant is liable for the accident, on the ground that he failed to furnish plaintiff with a safe place to work. But it conclusively appears that the relation of master and servant did not exist between plaintiff and defendant. On his own evidence, plaintiff was a contractor, and contracted with defendant to do the necessary tin work on the building at a specified price. There is no basis for the claim that plaintiff was defendant's servant, and the safe place to work rule has no application.

Though, as we have held, the relation of master and servant did not exist between defendant and plaintiff, it is not true that defendant owed no duty to plaintiff. Plaintiff was not wrongfully on the premises, or even as a mere licensee. He was there by the invitation of defendant, for the purpose of performing his contract. Defendant owed him the duty of exercising reasonable care to avoid injuring him. *Hyatt v. Murray*, 101 Minn. 507, 509, 112 N. W. 881. And we are unable to hold that plaintiff had no right to use the scaffolding put up by the carpenters for their own use. *Lauritsen v. American Bridge Co.* 87 Minn. 518, 92 N. W. 475. If therefore defendant had furnished the scaffold as a completed structure, or if he had selected the materials to be used in its construction by the carpenters, it might be said that he was liable for failing to use ordinary care in case he picked out timber that was of insufficient strength to bear the weight of the men who might be expected to use the structure. But the evidence wholly fails to make out such a case. Defendant did not furnish or construct the scaffold. Presumably he furnished the timber of which it was built as a part of the materials for the erection of the house, which he agreed to furnish. But he did not select the timber that was to go into the scaffold. That was



constructed by the carpenters out of the timber that was on hand. The evidence shows that there was a pile of timber on the premises, including two by fours.

The carpenters picked out the pieces that were suitable for use in building the scaffold. It surely cannot be said that defendant was bound to inspect the different boards and pieces of timber that went into the scaffold. And clearly he is not liable under the rule of *respondeat superior* for the negligence of the carpenters. They were not his servants, but were independent contractors. We hold that the evidence fails to show that defendant was negligent in the performance of any duty that he owed to the plaintiff, and therefore that the trial court correctly disposed of the case.

Order affirmed.

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ELGIN R. DICKSON v. EFFIE V. MILLER and Another.<sup>1</sup>

January 23, 1914.

Nos. 18,262—(126).

**Delivery of deed to third person — evidence.**

1. The evidence sustains a finding that the grantor in a deed delivered it to a third person with instructions to deliver it to the grantee upon the grantor's death, parting with all control of it, not reserving a right to recall it, and intending thereby to make a final disposition of the property deeded.

**Title of grantee.**

2. The grantee in a deed thus delivered, upon the death of the grantor and the delivery of the deed to him by the depositary, has absolute title.

<sup>1</sup> Reported in 145 N. W. 112.

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Note.—As to the right of a grantor to revoke deed delivered to stranger to be delivered by him to grantee after grantor's death, see notes in 4 L.R.A.(N.S.) 816 and 9 L.R.A.(N.S.) 317. And upon the question of the delivery of a deed to third person, or record by grantor, as a delivery to the grantee, see notes in 54 L.R.A. 865; 9 L.R.A.(N.S.) 224; and 38 L.R.A.(N.S.) 941.

**Recall of deed by grantor.**

3. The grantor in such a deed cannot recall it.

**Not a testamentary disposition.**

4. Such a deed is not testamentary in character.

**Declarations of grantor inadmissible in evidence.**

5. Declarations of a grantor in such a deed, while in possession of the property and after the delivery of the deed to the depository, to the effect that she retains the right to recall the deed, are inadmissible.

Action in the district court for Winona county to adjudge plaintiff to be the owner of the premises described, that defendant Effie V. Miller has no interest therein by reason of the deed described in the opinion, that such deed be adjudged to be a cloud upon the record of plaintiff's title to the premises, and that the same be canceled of record. The answer alleged that the grantor deposited the deed with George Pfefferkorn with directions to hold the same and, unless previously recalled or his authority revoked, upon her death to deliver the same to plaintiff; that subsequently, plaintiff failing to perform the services anticipated by the deceased, she cancelled and revoked the authority of Pfefferkorn so given to him, recalled the deed and demanded of him that he surrender possession thereof. The foregoing allegations of the answer were denied in the reply. The case was tried before Snow, J., who found that plaintiff was the owner in fee of the premises described and ordered judgment in his favor. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

*M. B. Webber and Webber & Lees, for appellant.*

*Brown, Abbott & Somsen, for respondent.*

DIBELL, C.

This action is brought to determine the title to certain real property in St. Charles in Winona county. There was judgment for the plaintiff and the defendants appeal.

1. On May 17, 1906, Emily E. Dickson, the mother of the plaintiff and the defendant Effie V. Miller, the other defendant being Mrs. Miller's husband, executed a warranty deed of a certain lot in St. Charles, in Winona county, to the plaintiff, and delivered it to

George Pfefferkorn, the banker at St. Charles, and directed him to keep it until her death and then to deliver it to the plaintiff. The deed reserved a life estate. On April 13, 1912, Mrs. Dickson demanded from Pfefferkorn a return of the deed. It was refused. On April 13, 1912, she deeded the lot to her daughter, the defendant. On June 13, 1912, she died. Pfefferkorn, upon her death, delivered the deed to the plaintiff. He first knew of the deed to him in January, 1912. Mrs. Miller, when she took her deed, knew of the prior deed to her brother.

The trial court found that the deed was delivered by Mrs. Dickson to Pfefferkorn without any intention or expectation of recalling it or repossessing herself of it and without a reservation of any control over it or right to recall it. It was in the possession of Pfefferkorn with specific directions as to its further disposition. It is held in some of the cases that a reservation of a life estate evidences an intent to give a present effect to the deed. *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. 326; *Ball v. Foreman*, 37 Oh. St. 132; *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99; *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. 287, 19 L.R.A. 242, 40 Am. St. 415. In any event the evidence clearly shows that Mrs. Dickson parted with all control of the deed and intended to make a final disposition of her property by a delivery of it and the court could not have found otherwise.

2. A deed thus executed and delivered is given effect and upon the delivery to the grantee upon the death of the grantor he has absolute title. Some cases proceed upon the theory that a present interest vests in the grantee upon the delivery to the depositary and upon the death of the grantor the title is absolute. Others seem to hold that, the delivery to the depositary being absolute, title passes upon the death of the grantor, or upon the delivery of the deed by the depositary; and, if necessary to promote the ends of justice, they adopt the fiction that the title relates to the date of the delivery to the depositary. Some say that the grantor makes the depositary the trustee of the grantee to receive the deed. It seems that the most carefully considered cases are based upon the theory that a present interest passes upon the delivery to the depositary, though enjoyment

of the estate is postponed, and that upon delivery at the death of the grantor the title in the grantee is absolute. If the right to recall or control the deed is reserved, by the great weight of authority title will not pass by the deed for want of delivery, even though the depositary makes delivery after the grantor's death. The cases involving the questions suggested are collated and discussed in the following cases and notes thereto: *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L.R.A. 865; *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 4 L.R.A.(N.S.) 816, 112 Am. St. 152; *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L.R.A.(N.S.) 224; *Renahan v. McAvoy*, 116 Md. 356, 81 Atl. 586, 38 L.R.A.(N.S.) 941; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439, 53 Am. St. 532; *Williams v. Daubner*, 103 Wis. 521, 79 N. W. 748, 74 Am. St. 902. There is an excellent but brief analysis in 26 *Harvard Law Rev.* 565.

3. The final question is whether Mrs. Dickson had the right to recall the deed to her son. Pfefferkorn was not her messenger to carry the deed to the grantee. He was not her agent to deliver the deed after her death. He did not hold it as her agent. He was the depositary for the purpose of a delivery which she intended should determine the final disposition of her property. Authority to deliver can be revoked. A delivery cannot be. A deed delivered to a third person to be delivered to the grantee at the grantor's death cannot be recalled. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. 186; *Robbins v. Rascoe*, 120 N. C. 79, 26 S. E. 807, 38 L.R.A. 238, 58 Am. St. 774; *Arrington v. Arrington*, 122 Ala. 510, 26 South. 152. It would seem that this is the necessary result of the holdings to the effect that a delivery of a deed to a third person to be delivered to the grantee passes an interest and that a reservation of control over the deed or of a right to recall it, just as in the case of an ordinary conveyance, makes the deed ineffective as a deed for want of delivery. This is in accord with the cases and notes cited in paragraph 2, *supra*, and the doctrine is thoroughly settled. If it is desirable that a delivery to a third person to be delivered to the grantee upon the grantor's death be subject to recall at the grantor's

option so as not to pass title, and effective to pass title if not recalled, the result should be reached by legislation.

We hold that Mrs. Dickson had no right of recall of the deed to her son and that upon her death title was absolute in him. This result is supported by the reasoning of the cases in this state. *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631; *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155.

4. The defendants rely upon *Hale v. Joslin*, 134 Mass. 310. The court there found that there was no delivery sufficient to vest title, and that the depositary held the deed as agent of the grantor, and that the act of the grantor was in the nature of a testamentary act revoked by a subsequent will. It is true that the language used by the grantor, when he left the deed with the depositary, is much like the language used in the case at bar. Of course if the conveyance here involved were testamentary in character it would be invalid for want of form and Mrs. Miller's deed would put the title in her. The deed under consideration is not testamentary in character within the cases cited *supra*.

5. The appellants sought to prove declarations of Mrs. Dickson while in possession of the property and subsequent to the delivery of the deed to Pfefferkorn to the effect that she retained the right to recall it. These declarations were self-serving and in derogation of the title of her grantee. They did not characterize her possession. They were properly excluded. *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797, 41 L.R.A. 258; *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L.R.A.(N.S.) 224; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. 186.

Judgment affirmed.

MINNEAPOLIS, ST. PAUL, ROCHESTER & DUBUQUE  
ELECTRIC TRACTION COMPANY v. CITY OF  
MINNEAPOLIS.<sup>1</sup>

January 23, 1914.

Nos. 18,264—(155).

**Bridge — contract between city and railway company ultra vires.**

1. The city of Minneapolis has no power to enter into a contract with a company operating a commercial railway, by which the city agrees to bear part of the expense of strengthening a city bridge which the railway company desires to cross with its cars, where the bridge is already of sufficient strength and construction to accommodate general travel, and the sole purpose of the improvement is to permit the operation of such railway cars thereover.

**Void contract.**

2. Plaintiff desired to cross this bridge in order to meet the line of the Minneapolis Street Railway Co. The city, in lieu of permitting the plaintiff to cross the bridge, directed the City Railway Co. to extend its line across the bridge to plaintiff's terminus. The public also has used the bridge for general travel. These facts impose no liability upon the city, since the contract was beyond the corporate power of the city and was not susceptible of ratification, but was wholly void.

Action in the district court for Hennepin county to recover \$2,500. The facts are stated in the opinion. Defendant's demurrer to the complaint was overruled, Hale, J. The defendant then answered and the case was tried before Jelley, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. Defendant's motion for judgment in its favor or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

<sup>1</sup> Reported in 145 N. W. 609.

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Note.—On the question of the liability of a municipality or other public corporation on ultra vires contract, generally, see note in 27 L.R.A.(N.S.) 1124.

*Daniel Fish*, for appellant.

*M. H. Boutelle* and *A. M. Higgins*, for respondent.

HALLAM, J.

Plaintiff operates an ordinary commercial electric railway and is engaged in carrying passengers and freight between Minneapolis and various points south. In 1907 its Minneapolis terminus was at Nicollet avenue and Fifty-fourth street at the southerly limits of the city. The street cars of the Minneapolis Street Railway Co. ran up on Nicollet avenue to Fiftieth street. Plaintiff desired to extend its line on Nicollet avenue to Fiftieth street to connect with the street car line. Between Fifty-second and Fifty-fourth streets, Nicollet avenue crosses Minnehaha creek, over which the city some years ago constructed a public foot and wagon bridge. This bridge was not strong enough to permit the operation of either plaintiff's cars, or street cars, but the complaint alleges and the court finds that it was "of sufficient construction and strength to accommodate ordinary foot and wagon traffic \* \* \* and \* \* \* required \* \* \* neither strengthening nor reconstruction for any other purpose than that of permitting the laying of tracks and the operation of cars." About December 1, 1907, plaintiff applied to the city council of Minneapolis for an appropriation of \$10,000 for reconstructing and strengthening said bridge, "the sole and only object" being "to permit of the operation of the cars of the plaintiff thereover." On January 10, 1908, the city council passed a resolution directing the city engineer to hire men and purchase material to strengthen the bridge, at a cost not to exceed \$2,500. About March 15, 1910, the city engineer entered into a contract with plaintiff by which it was agreed that plaintiff should reconstruct the bridge with steel construction, at a cost of approximately \$9,000, and that the city should pay plaintiff the sum of \$2,500. Thereupon plaintiff reconstructed the bridge. Ever since its completion the bridge has been used as a public thoroughfare. At the times mentioned plaintiff had received no permission from the city to occupy Nicollet avenue. After completion of the bridge no such permission was granted to plaintiff, but "in lieu thereof" the city ordered the Minneapolis

Street Railway Co. to extend its tracks from Fiftieth street across the bridge to Fifty-fourth street, to a point of connection with plaintiff's line.

This is not the case of an improvement needed for the double purpose of railroad use and general public travel. The question in the case is this: Has the city council of Minneapolis the power to appropriate money to aid in reconstructing a bridge upon a street of the city where the existing bridge is sufficient for all purposes of general travel, and where the sole purpose of the improvement is to permit the laying of tracks and the running of cars of an ordinary commercial railway? We hold that the city council has no such power.

Plaintiff is in no sense a street railway. It carries no passengers from street to street within the city, but, with the city as a terminus, it operates from place to place, stopping and gathering business only at terminal or regular way stations. It is not an aid to travel upon a street. If it occupies a street it is an impediment only to street travel. *State v. Duluth Gas & Water Co.* 76 Minn. 96, 107, 78 N. W. 1032. It differs in no essential principle from the ordinary steam railway of commerce. The fact that its motive power is electricity instead of steam is of no consequence.

A commercial railway has no right to construct its tracks along city streets without the consent of the city. *G. S.* 1913, § 6136. It cannot acquire such right even under the power of eminent domain. *Duluth Terminal Ry. Co. v. City of Duluth*, 113 Minn. 459, 130 N. W. 18. The duties and obligations of a commercial railway company, when it is permitted to occupy a public street with its tracks, are well defined. It must fully restore the street to as serviceable a condition for public travel as existed before its tracks were laid. 2 Elliott, *Roads & Streets*, § 1056; 3 Elliott, *Railroads*, § 1105; *State v. St. Paul, M. & M. Ry. Co.* 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *People v. Chicago & A. R. Co.* 67 Ill. 118; *State v. Lake Koen N. R. & I. Co.* 63 Kan. 394, 65 Pac. 681; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Chicago & E. R. Co. v. Luddington*, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273; *State v. Hannibal & St. J. R. Co.* 86 Mo. 13. If such restoration requires the construction of a bridge over its tracks, it is the uncompensated



duty of the railroad company to construct such bridge. 1 Elliott, Roads & Streets, § 48; Cincinnati, I. & W. Ry. Co. v. City of Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, 20 Ann. Cas. 1206; Maltby v. Chicago & W. M. Ry. Co. 52 Mich. 108, 17 N. W. 717; State v. Minnesota Transfer Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656; Chicago, M. & St. P. Ry. Co. v. City of Minneapolis, 115 Minn. 460, 133 N. W. 169, Ann. Cas. 1912D, 1029. And to maintain it. State v. Minnesota Transfer Ry. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656. If the demands of traffic require that the bridge be later enlarged, the railroad company must bear the burden of enlarging it. Chicago, B. & Q. Ry. Co. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 598, 4 Ann. Cas. 1175; State v. Lake E. & W. Ry. Co. (C. C.) 83 Fed. 284. If the necessities of public travel require the opening of a street through its right of way, it must in like manner bridge the street so opened if public safety demands it. Cincinnati, I. & W. Ry. Co. v. City of Connersville, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. ed. 1060, 20 Ann. Cas. 1206; Chicago, M. & St. P. Ry. Co. v. City of Minneapolis, 115 Minn. 460, 133 N. W. 169, Ann. Cas. 1912D, 1029. These are common-law duties. If the railroad company fails in the discharge of any of these duties, the city may perform them and recover the expense. Chicago v. Pittsburg, C. C. & St. L. R. Co., 146 Ill. App. 403. "This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense." State v. St. Paul, M. & M. Ry. Co. 35 Minn. 131, 133, 28 N. W. 3, 5, 59 Am. Rep. 313.

The city has no power, in the absence of legislative authority, to appropriate money in aid of railroad building. 2 Elliott, Railroads, § 827; Board of Commrs. of Delaware County v. McClintock, 51 Ind. 325; Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. ed. 77; Norton v. Dyersburg, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. ed. 85; Young v. Clarendon Township, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. ed. 356; Lewis v. Pima County, 155 U. S. 54, 15 Sup. Ct. 22, 39 L. ed. 67. And the city has no power to aid a railroad company in the performance of the duties and obligations which

the construction and maintenance of its road imposes. A contract by the city to do so is both *ultra vires* and without consideration. The rights here concerned are rights of the public which the officers of the city cannot barter away. *Snow v. Deerfield Township*, 78 Pa. St. 181; *City of Newton v. Chicago, R. I. & P. Ry. Co.* 66 Iowa, 422, 23 N. W. 905. A contract by which a municipality undertakes to assume an obligation properly resting on the railroad company, to restore a road or street (*Snow v. Deerfield Township*, 78 Pa. St. 181), to build a bridge (*State v. St. Paul, M. & M. Ry. Co.* 98 Minn. 380, 403, 108 N. W. 261, 28 L.R.A.(N.S.) 298, 120 Am. St. 581, 8 Ann. Cas. 1047), or to maintain a bridge (*State v. Minnesota Transfer Ry. Co.* 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656), is wholly beyond the power of the city, and it is void.

It was the uncompensated duty of this plaintiff to build at its own expense such bridge as the operation of its road required. The fact that it became desirable to reconstruct one of the city's bridges into a railroad bridge did not relieve plaintiff of the burden of making such construction as was necessary for its purposes, nor did these facts permit the city to come to its aid, so long as the improvement was in no measure needed for the purposes of general public travel.

There is no statutory authority for such a contract as was here made. The contract was beyond the power of the city council and the city engineer, and was void.

2. The fact that the city did not in fact give plaintiff permission to pass over this bridge to meet the city railway line, but "in lieu thereof" accomplished the same purpose by directing the city railway to extend its line across the bridge to meet the line of plaintiff, does not change the situation and does not impose any obligation upon the city in favor of plaintiff which did not exist before these facts occurred. Nor does the fact that the public has used the reconstructed bridge give rise to any liability on the part of the city. The contract was invalid because it was beyond the corporate power of the city to make it. Such a contract is not susceptible of ratification, is wholly void, and any one dealing with the city on the basis of it can have no relief in law or in equity. *Bazille v. Board of Co. Commrs. of Ramsey County*; 71 Minn. 198, 73 N. W. 845; *Bell v.*

Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L.R.A.(N.S.) 793, 120 Am. St. 621; Jackson v. Board of Education of City of Minneapolis, 112 Minn. 167, 127 N. W. 569; First National Bank of Goodhue v. Village of Goodhue, 120 Minn. 362, 363, 139 N. W. 599, 43 L.R.A.(N.S.) 84.

Judgment reversed.

On February 27, 1914, the following opinion was filed:

**PER CURIAM.**

We have examined with care the exhaustive brief presented by plaintiff on motion for reargument. The matters there presented were quite fully considered by the court before reaching the decision.

The controlling fact in the case is, that the rebuilding of this bridge was not required by any public necessity, or for any use or purpose except the prospect of accommodating cars of plaintiff.

The decisive principle of law in the case is, that the city authorities had no power to contract to rebuild a street bridge when such improvement was needed solely for the purpose of enabling a commercial railway to use it for railway purposes.

Counsel urges that there was no private purpose involved, since the plaintiff was never permitted to extend its tracks across the bridge, but that a public purpose was served by reason of its use for public travel and the operation of street cars over it.

The fact that plaintiff did not use the bridge after it was reconstructed could not make its reconstruction a public necessity, nor transform a contract which could serve only a private use into one for a public use.

The fact that the public did use the bridge did not give rise to any obligation. Its use could not be avoided. There was no option to reject it. *Young v. Board of Education*, 54 Minn. 385, 55 N. W. 1112. The case is distinguishable from *Laird Norton Yards v. City of Rochester*, 117 Minn. 114, 134 N. W. 644.

The fact that the old bridge was not strong enough for operation of street cars, and that the new bridge was later used for the operation of street cars, is not, under the circumstances, of controlling import-

ance. The right of the city to build bridges so that street cars may provide increased facilities for street traffic, is not involved. The fact is that, though the plaintiff was not permitted to cross the bridge for the purpose desired, that is, to reach the street car terminal, the same result was accomplished with the same benefit to plaintiff by the extension of the street-car line across the bridge to plaintiff's terminal. The record shows that the extension of the street-car line was "in lieu of" the extension of plaintiff's line across the bridge. There is no basis for an inference that the determination to expend \$2,500 to rebuild this bridge had at any time any relation to the handling of street traffic in the outlying district.

As indicated in the opinion, the question of the power of the city in case of an improvement needed for the double purpose of railroad use and general public travel, is not involved.

Motion for reargument denied.

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**HIRAM HARRIS v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

January 23, 1914.

Nos. 18,302—(196).

**Carrier — injury to shipment — error to exclude evidence.**

In this action to recover damages alleged to have been caused to a carload of opera chairs while being transported from Minneapolis to Herman, Minnesota, the evidence showed that on the arrival of the car at Herman the consignee refused to receive the shipment, and it was returned to Minneapolis in the same car without being unloaded. It is *held*: It was prejudicial error to exclude evidence of competent witnesses to prove that the chairs were in the same condition when the car arrived in Minneapolis on its return from Herman as they were when loaded for shipment.

<sup>1</sup> Reported in 145 N. W. 115.

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Note.—As to the right of a consignee who refuses to accept goods to maintain action for damages against carrier, see note in 30 L.R.A.(N.S.) 1071.

Action in the municipal court of Minneapolis to recover \$400. The case was tried before Montgomery, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for \$350 and interest in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

*Cobb, Wheelwright & Dille and H. C. Mackall, for appellant.*

*S. B. Child, Benjamin Drake and Sherman Child, for respondent.*

BUNN, J.

This action was brought to recover damages alleged to have been caused second-hand opera chairs while being transported on defendant's line from Minneapolis to Herman, Minnesota. Plaintiff recovered a verdict for \$350, a new trial was denied, and defendant appealed.

The assignments of error relate to the exclusion of evidence offered by defendant on the trial, and to the amount of the verdict.

Plaintiff was in the opera chair business in Minneapolis. The shipment in controversy consisted of 500 second-hand folding chairs, which plaintiff had purchased with others from a theater in Minneapolis. They were loaded by plaintiff's employees in a car of defendant, and transported to Herman. The consignees examined the shipment on its arrival and refused to receive it. The chairs were returned to Minneapolis in the same car, without being unloaded.

Plaintiff produced the usual evidence to make a prima facie case, his witnesses testifying to the good condition of the chairs when they left Minneapolis, and their broken and damaged condition when they arrived at Herman. The evidence of defendant's witnesses tended to show that the chairs were more or less broken when they were loaded into the car, and in no worse condition when the car reached Herman.

The evidence excluded by the trial court was testimony offered by defendant to show that the chairs were in the same condition when they arrived at Minneapolis, on the return of the car from Herman,

as when the car left Minneapolis for Herman. One of the witnesses by whom defendant offered to prove the condition of the chairs on their return from Herman was a freight inspector of the Western Weighing Association Bureau, who inspected the shipment before it left Minneapolis, and again after the car arrived from Herman. The other witnesses were employees of defendant in its freight yards in Minneapolis.

It was prejudicial error to exclude evidence of a competent witness to show the facts offered to be proved by defendant. It needs no argument or authority to establish the relevancy of such evidence. If the chairs were in the same condition on the return of the car to Minneapolis as they were when shipped from Minneapolis, it is very persuasive if not conclusive proof that they were not damaged while en route from Minneapolis to Herman. We can hardly assume that the chairs miraculously recovered from their wounds on the return trip. The trial court had excluded evidence offered by the plaintiff to show the damaged condition of the chairs on the return of the car to Minneapolis, on the theory that this damage might have occurred on the return trip, and therefore, under the pleadings, could not be the basis of a recovery. The correctness of this ruling is not involved on this appeal, but the court evidently considered excluding the evidence offered by defendant was applying the same rule to both parties. The distinction is so obvious that we need not point it out.

At least one of the witnesses by whose testimony defendant offered to prove the condition of the chairs on their return from Herman, was qualified by his knowledge of the facts to testify.

We cannot say that the error was without prejudice. The ruling shut out important evidence directly bearing upon the issue in the case, and we are not justified in saying that it did not affect the result. We think the offer was sufficient.

As there must be a new trial, we do not decide the question of excessive damages. The size of the verdict, however, when compared with the amount paid by plaintiff for the chairs, convinces us that there is justice as well as law in requiring the case to be tried again.

Order reversed and new trial granted.

F. J. RAETTI and Another v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

January 23, 1914.

Nos. 18,314—(195).

**Injury to live stock — evidence — verdict.**

In an action to recover damages done to cattle shipped over the defendant railroad, it is *held* that the verdict is not so against the evidence that it should be disturbed by this court.

Action in the district court for Mille Lacs county to recover \$5,495. The case was tried before Roeser, J., and a jury which returned a verdict for \$3,241.88 in favor of plaintiffs. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*Stiles & Devaney*, for respondents.

**DIBELL, C.**

This action was brought to recover damages done to some four or five hundred head of cattle shipped from Chinook, Montana, to the stockyards at South St. Paul. The plaintiff had a verdict for \$3,241.88. The defendant appeals from the order denying its motion for a new trial.

The plaintiffs claim that the cattle were handled in a rough and violent manner in course of transit and were insufficiently fed and arrived at their destination in a much damaged condition.

The only question is as to the sufficiency of the evidence to justify the verdict. We have read all the testimony bearing upon the rough handling of the cattle and the amount of damage done them. We are impressed with the thought that the plaintiffs' claims are exaggerated. The question was one for the jury. Their verdict has the approval of the trial court. We are unable to say that it is so against the evidence that a reversal should be had.

Order affirmed.

<sup>1</sup> Reported in 145 N. W. 112.

**SIMON SALO v. DULUTH & IRON RANGE RAILROAD  
COMPANY.<sup>1</sup>**

**January 23, 1914.**

**Nos. 18,319—(207).**

**Notice of appeal — non-appealable orders.**

1. The appeal is from the judgment and is not rendered ineffective by the reference in the notice of appeal to non-appealable orders, or to the items claimed to have been erroneously omitted from the judgment.

**Appeal from judgment for costs and disbursements.**

2. An appeal lies from a judgment involving only the costs and disbursements where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount.

**Non-taxable disbursements.**

3. Expenses for serving subpoenas by a private person are not taxable disbursements.

**Same — transcript of testimony.**

4. Nor are amounts paid for transcript of testimony obtained for the use of the attorney during the progress of the trial.

**Same — maps and photographs.**

5. The expense for maps and photographs received in evidence is not necessarily an item of taxable disbursements. The trial court's determination that the map and photographs were not necessary disbursements is not shown to have been erroneous or an abuse of judgment or discretion in this case.

**Same — documentary evidence — proportionate share of cost.**

6. Where an attorney has secured a number of clients and brings separate actions against a defendant whose one act of negligence has injured each client, and the attorney procures documentary evidence which is to be used successively in the trial of each case, and the defendant makes a settlement, which includes disbursements, with all litigants save one, that one is not entitled to tax as costs for such documentary evidence more than his proportionate share of its cost unless he shows that he has actually paid or incurred more than such share. Plaintiff failed to make such showing.

<sup>1</sup> Reported in 145 N. W. 114.



From the taxation of costs and disbursements in favor of the plaintiff in the above entitled action, in the district court for St. Louis county, both parties appealed. The appeals were heard before Dancer, J., who affirmed the taxation of the clerk except as to two items. From that order, plaintiff appealed. Affirmed.

*J. W. Reynolds*, for appellant.

*Baldwin & Baldwin*, for respondent.

HOLT, J.

After many trials and vicissitudes the merits of this case have been settled and adjusted and only the taxable disbursements remain to furnish matter for litigation. It appears that in June, 1910, an attorney procured 37 clients, making identical contracts with each as to fees and disbursements. These clients were settlers near defendant's railway, who had been damaged by a fire claimed to have been set through its negligence. The attorney duly commenced an action for each of these 37 clients against defendant to recover for the injury. Only a few of these actions were tried. The loss to each plaintiff was occasioned by the one fire. The damages claimed were very large and no doubt justified careful preparation for trial. Three trials have been had in the district court, and twice the case has been here, one decision reported in 121 Minn. 78, 140 N. W. 188, and the other reported *infra*, page 526, 144 N. W. 1134, in respect to the attorney's right to the proceeds. In one of these trials defendant prevailed, and became entitled to costs to be offset against the amount which might be taxable in favor of plaintiff on the other two. This right of plaintiff to tax costs appears to have been given by the terms of settlement. The clerk taxed the costs and both parties appealed. On the appeal the clerk's taxation was affirmed, except as to two items amounting to \$28.90 which were disallowed. Plaintiff appeals.

Defendant moves to dismiss because (a) the appeal is from orders and from a part of the judgment, and (b) no appeal lies from a judgment for costs only. The motion must be denied. It is true the orders referred to in the notice of appeal are not appealable, but on appeal from the judgment the errors sought to be corrected in the

orders may be reached. The notice is sufficient to bring the judgment here for review, at least as to all items therein specified which were rejected in toto. *St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012. We also deem it settled in this state that a judgment for costs alone is appealable (*Harrington v. Town of Plainview*, 27 Minn. 224, 6 N. W. 777), especially in a case where the settlement of the cause of action provided that costs should be taxed and allowed by the court. The case of *Thomas v. Craig*, 60 Minn. 501, 62 N. W. 1133, relied on by defendant to the effect that this court will not entertain an appeal to determine merely the right to a trifling amount of costs, cannot be considered decisive of a case where the disbursements claimed involve over \$2,000.

On the merits of the appeal these questions arise: (a) May fees be taxed for serving subpoenas by a private person? (b) Is a stenographic transcript of the testimony for the use of the attorney during the trial a taxable disbursement? (c) Must the court permit disbursements to be taxed for photographs and maps received in evidence? (d) Was it proper for the court under the circumstances of this case to allow only 1-37 of the disbursement for documentary evidence obtained for use in all the cases?

Nothing may be taxed for serving a summons unless the service is made by sheriff. This rule fixed by statute (section 7730, G. S. 1913), prohibiting the allowance of compensation for service of summons when made by a private party, has been followed in respect to service of subpoena ever since the courts were established in the state, if we are correctly advised. We are not inclined to change this practice, for to do so will but add to the expense of litigation and lead to abuse.

The same applies to transcripts of testimony obtained by the attorney from the stenographic reporter or, for that matter, from a private stenographer, while the case is on trial. In important cases attorneys frequently thus obtain a transcript of the evidence during the trial. Its use and value in cross-examination, in knowing exactly what to rebut and in the final argument to court or jury, is well understood. But, unless by agreement between attorneys, the cost of such transcripts have not been considered taxable disbursements

against the defeated party. If we rule as plaintiff desires on this point, we may look for a transcript to tax in almost every case tried. *Wisconsin S. F. Co. v. D. K. Jeffris Lumber Co.*, 132 Wis. 1, 111 N. W. 237.

Plaintiff attempted to tax \$50 for photographs and \$1,500 for a map of the burned district offered and received in evidence at the trial. Complaint is made because these items were wholly rejected by the court. Appellant contends that, because these were received in evidence, it follows that the cost thereof to him must be allowed under the statute. It is the province of the trial court to determine whether these were disbursements "necessarily paid or incurred." Section 7976, G. S. 1913. To a large extent this involves an exercise of discretion and judgment. No abuse is shown, nor is this record such that we can say that the court's finding that these were not necessary disbursements is not sustained. The affidavit of respondent's attorney makes it clear that the matters which the map and photographs tended to prove might as well have been proven by oral testimony. No doubt the photographs and map were convenient, but it does not follow that they were necessary. *Thompson v. Germania Life Ins. Co.* 97 Minn. 89, 106 N. W. 102; *Hoyt v. Jones*, 31 Wis. 389; *Mark v. City of Buffalo*, 87 N. Y. 184; *Miller v. Highland Ditch Co.* 91 Cal. 103, 27 Pac. 536; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. 158; *Weiss v. Meyer*, 24 Ore. 108, 32 Pac. 1025.

Another objection is urged to the judgment that, while the court allowed plaintiff to tax for certified copies of reports of the state fire warden, only 1-37 of the amount paid was permitted in the judgment. We think the court was right. The affidavit of respondent's attorney makes it plain that these reports were procured for the trial of the 37 cases mentioned, that all the other cases had been settled and in the settlement thereof the disbursements of the several plaintiffs were adjusted and paid by defendant. This leaves defendant liable to this appellant only for the proportionate share he has incurred. There is no showing that he has paid or incurred more than his share. The case of *Jermain v. Lake Shore & M. S. R. Co.* 31 Hun, 558, seems applicable.

We do not think the point that defendant's appeal from the clerk's taxation of costs was ineffective because taken a day too late, under the rules of the district court, is well taken or merits discussion.

Judgment affirmed.

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WADE DAVIS v. WILLIAM H. CONDIT.<sup>1</sup>

January 23, 1914.

Nos. 18,332—(197).

**Breach of promise to marry — action against third person.**

An affianced husband has no cause of action against one responsible for the seduction of his affianced wife, or for the alienation of her affections, or, for her debauching, making proper the breach by him of the marriage contract.

Action in the district court for Hennepin county to recover \$20,000. From an order, Steele, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Affirmed.

*Jay W. Crane*, for appellant.

*Kerr, Fowler, Ware & Furber*, for respondent.

**PER CURIAM.**

Appeal from an order sustaining a demurrer to the complaint.

The complaint alleges that the defendant maliciously debauched and seduced the affianced wife of the plaintiff, and alienated her affections, and maliciously interfered with the marriage contract then subsisting, causing him properly to break it.

The common law gives the affianced husband no cause of action for the seduction of his affianced wife and no statute gives one. See *Case v. Smith*, 107 Mich. 416, 65 N. W. 279, 31 L.R.A. 282.

The right to recover for alienation of affections or for criminal

<sup>1</sup> Reported in 144 N. W. 1089.

conversation is a right arising from the marital relation. It is not extended to parties to a betrothal.

The plaintiff claims that the act of the defendant was a malicious interference with the marriage contract between himself and his fiancée. In *Joyce v. Great Northern R. Co.* 100 Minn. 225, 229, 110 N. W. 975, it is held that a wrongful and malicious interference by a stranger with the contract relations of others, by causing one to commit a breach, is an actionable tort. The breach of contract in the case at bar was by the plaintiff, not by his affianced wife. Because of her unchastity he was justified in breaking the contract; but we are unable to hold that the situation of the parties is such that the plaintiff has a cause of action against the defendant for bringing about her unchastity, though he acted maliciously.

Order affirmed.

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THOMAS LAWRENCE QUIGLEY v. C. S. BRACKETT  
COMPANY.<sup>1</sup>

January 23, 1914.

Nos. 18,340—(219).

**Deposit of wages — liquidated damages.**

An employee hired for no definite time was required to deposit a month's wages with the employer to guarantee that he would keep sober while at work. The jury under proper instructions found that the agreement relating to the deposit was not one for liquidated damages. The evidence supports the finding.

Action in the municipal court of Minneapolis to recover \$75 for services. The defense is stated in the opinion. The case was tried

<sup>1</sup> Reported in 145 N. W. 29.

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Note.—On the general question whether a sum deposited to secure performance of a contract is a penalty or liquidated damages, see note in 38 L.R.A.(N.S.) 847.

before Montgomery, J., who denied plaintiff's motion for a directed verdict and a jury which returned a verdict for \$83.66 in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*A. S. Keyes and Henry Ebert, for appellant.*

*Edward M. Nash, for respondent.*

HOLT, J.

Plaintiff worked for defendant from October 4, 1910, until some time in March following as a compounder of liquors. When hired it was agreed that the first month's wages, \$75, should be retained by defendant "on the conditions that I wouldn't get drunk while I was in their employ," as plaintiff testifies. Plaintiff sues for the \$75 retained under this agreement. The defense is, plaintiff was discharged for repeatedly becoming intoxicated while at work, and thereby defendant became entitled to the money as liquidated damages. The court assumed that plaintiff breached the agreement, and submitted to the jury the single question whether the deposit was in the nature of liquidated damages or a penalty. No point is made that the answer was not for the jury. No fault is found with the guide given them for determining the issue, and which was practically in line with *Taylor v. Times Newspaper Co.* 83 Minn. 523, 86 N. W. 760, 85 Am. St. 473. Hence the only matter presented here is the sufficiency of the evidence to sustain the finding that the money could not be retained by defendant as liquidated damages.

Courts are inclined to place that construction upon contracts of this nature which will give actual compensation for a breach rather than one which creates a forfeiture. The considerations to be kept in mind in construing such contracts are well stated in *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149. We need not discuss these in detail as applied to the instant case. It is sufficient to point out that judging from the salary, the position plaintiff filled could not have been of great consequence to defendant. He did not come in direct contact with its customers, for he worked in the cellar, and the effect of his blends could neither have attracted nor deterred the trade. And, what perhaps weighs most, he was not hired for any

definite time, nor does the evidence disclose any suggestion that his position was likely to be of any permanency. The service could be terminated at any time at the pleasure of either party. In *Keeble v. Keeble*, supra, the one who contended that the stipulated liquidated damages should be construed as a penalty held the position of ostensible partner and manager of the business at a large salary. It is easy to perceive how a breach of an agreement to keep sober by such an employee would result in large damages, difficult of ascertainment, to the employer. The case of *Henderson v. Murphree*, 109 Ala. 556, 20 South. 45, also cited by appellant, is where a person, without capital, was taken into a partnership, on condition that if he got drunk the partnership terminated and his interest therein became forfeited to the firm, and that, in such event, for the time he had been a member of the firm, stipulated wages should be paid him. Neither case is authority for holding that the parties to this action intended the deposit as anything more than security for payment of damages resulting from a breach of the condition.

Order affirmed.

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DANA H. JENKINS v. MINNEAPOLIS & ST. LOUIS RAIL-  
ROAD COMPANY.<sup>1</sup>

January 23, 1914.

Nos. 18,345—(203).

**Negligence in regard to signals and lights—question for jury.**

1. Evidence in an action to recover damages for injuries sustained by the driver of a wagon in a railway crossing accident considered and held sufficient to take the case to the jury as to defendant's negligence with reference to warning signals, speed of the train, and necessity for lights thereon.

<sup>1</sup> Reported in 145 N. W. 40.

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Note.—On the question of the failure to give customary signals as excusing nonperformance of duty to look and listen, see note in 3 L.R.A.(N.S.) 391.

**Contributory negligence.**

2. Taking into account the time of the accident, obstructions to view, dark color of the unlighted train, with like background, and testimony with regard to failure to give warning signals of the train's approach, together with other circumstances disclosed, plaintiff could not be held guilty of contributory negligence as a matter of law, though he did not stop his team before attempting to cross.

**Same — burden of proof.**

3. The burden of proof upon the issue of contributory negligence was controlled by the rule in this state, notwithstanding the accident occurred in another state.

**Reduced verdict not excessive.**

4. Verdict as reduced by trial court sustained as against claim of excessiveness.

Action in the district court for Ramsey county to recover \$75,000 for injury received at a highway crossing over defendant's railway. The answer alleged that, if plaintiff was injured by being struck by a train, his injuries were caused by his neglect to observe any care whatsoever and such negligence was the direct cause of any injury received. The case was tried before Johnson, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$30,316.67 in favor of plaintiff. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, upon condition that plaintiff consented to a reduction of the verdict to \$25,000, defendant appealed. **Affirmed.**

*W. H. Bremner and F. M. Miner, for appellant.*

*Samuel A. Anderson and A. F. Storey, for respondent.*

**PHILIP E. BROWN, J.**

Plaintiff had a verdict for \$30,316.67, subsequently reduced to \$25,000 in an action to recover damages resulting from a highway-crossing collision, alleged to have occurred through defendant's negligence in operating, at excessive speed and without giving warning signals of approach, a passenger train with no lights either on engine or in coaches. The case comes here on defendant's appeal from an order denying its motion for judgment or a new trial.

The accident occurred at Perry, Iowa, a city with upwards of



5,000 inhabitants, on October 5, 1912. Defendant's line passed through there in a northwesterly to southeasterly direction, crossing the streets at an angle of about 30 degrees. Its passenger station was located east of the main line, the south end projecting about 10 feet beyond the north line of Otley avenue, which ran east and west, and was crossed by two tracks east of the main line, and parallel thereto, at distances of about 50 and 175 feet, and known as the "house track" and the "electric light track," respectively. The station was about 100 feet in length, extending northerly, its west side being about 20 feet from the main track. There was a water-tank near the latter, on its east side, about 300 feet northwest of the north line of Otley avenue, and opposite this, 25 or 30 feet west of the main track, was a grain elevator building. In the evening of the day stated plaintiff drove a team attached to a wagon west about 300 feet along Otley avenue, crossed the house and electric light tracks, and passed south of the station to a point near the main line, when a passenger train some 255 feet or more in length, without light on engine or in cars, approached from the north, and the team jumped to the left and passed over the main track, but the wagon was struck by the engine and plaintiff injured.

1. Defendant claims the proofs failed to establish negligence on its part. Taking into account the location of the station and other obstructions to view situated east of the main line, it must be said that the crossing was a dangerous one, especially in case of neglect of duty with respect to warnings of trains approaching from the north. A whistle was blown at a point known as the "Wye," about one-half mile north of the station; but several attentive and apparently disinterested witnesses testified that none other was sounded, nor bell rung. As to speed, like witnesses estimated that the train was running from 15 to 20 miles an hour, while witnesses for defendant stated otherwise. The defendant's train crew, when testifying, gave no evidence as to speed. In the matter of absence of lights on the train, defendant insists the accident occurred very close to 6:15 o'clock p. m., and that it was not then dark enough to require lighting of the headlight or cars. But it appeared, among other things to be mentioned later, that another of defendant's engines in the yard

had its headlight burning at the time. Upon this state of the record, all questions concerning signals, speed, and necessity for lights, were clearly for the jury.

2. Defendant's principal contention relates to contributory negligence. While we have many cases dealing with this question, it is useless to attempt to fit the facts of this case to any of them. Facts rarely, if ever, are identical, and we have no case involving the precise circumstances disclosed. However, certain principles have become settled in analogous cases, and if their application leads to the conclusion of plaintiff's negligence as a matter of law, he cannot recover. Thus, a railway grade-crossing is a place of danger, and the track itself a warning. It must be approached circumspectly by persons purposing to cross, and they are charged with notice of probability of approaching trains at all times. If the crossing may properly be termed "dangerous," and they are familiar with the surroundings, additional care is required. One about to drive a team across must look and listen for approaching trains, but need not necessarily halt when none are seen or heard. Yet he must alertly use his sight and hearing to discern their approach, and special and peculiar circumstances may require a stop. *Beanstrom v. Northern Pac. R. Co.* 46 Minn. 193, 48 N. W. 778. Travelers may, within reasonable limits, act upon the assumption that due care will be exercised in management of trains and giving of crossing signals. 2 *Dunnell*, Minn. Dig. § 8192, and cases cited. When the evidence conclusively shows the colliding train must have been visible from the point where the injured person claims to have looked and listened, a conclusive presumption arises either that he failed to look and listen, or else heedlessly disregarded the knowledge thus obtained and negligently encountered obvious danger. *Carlson v. Chicago & N. W. Ry. Co.* 96 Minn. 504, 106 N. W. 555, 113 Am. St. 655, 4 L.R.A. (N.S.) 349. In short, the care required must be commensurate with the danger to be apprehended, and whether such was used in a particular case is a question for the jury, unless the evidence is conclusive. Furthermore, this court is not disposed to reverse on the ground

of plaintiff's contributory negligence unless it clearly appears. *Schmidt v. Great Northern Ry. Co.* 83 Minn. 105, 85 N. W. 935.

Plaintiff, driving standing, a team of young horses, of ordinary gentleness and accustomed to cars, attached to an empty lumber-wagon, turned into Otley avenue from an intersecting street at a point some 300 feet from the station. Permanent structures entirely prevented a view northward for a considerable space from the point of turning. A short distance further on was the "electric light track," with numerous cars extending about a block northerly. A small building was located near the station, east of the "house track," and on the latter several cars were standing north of and parallel with the station. The main track, running northerly from the station, was straight. Plaintiff, therefore, had little, if any chance to see a south-bound train, except in the space between the "electric light track" and the small building, a distance of from 80 to 100 feet. He was 27 years old, with unimpaired faculties of sight and hearing, and thoroughly familiar with the crossings and situation of tracks with relation to streets and structures. When he turned into Otley avenue his team was trotting. He saw a number of people standing around the station, apparently waiting for a train. In the yard to the south stood the engine with headlight, before mentioned. At a point on the street approximately equidistant from the electric and house tracks, plaintiff met an automobile, and claims to have pulled his team down to a walk, after which he started up and proceeded, with one horse prancing, as usual, the other walking or at a slow trot, also prancing, until almost immediately before the accident. He also claims that as he passed along the avenue he continually looked for trains from both north and south, but neither saw nor heard any except the one with the headlight burning. The exact time of the accident does not appear, but doubtless it was not earlier than 6:15. The sun set at 5:52. A number of witnesses at and near the station testified to seeing the train near the water tank, but none from plaintiff's point of observation. Defendant argues that it conclusively appears, both from the testimony and the physical facts, that the team approached the crossing at a rapid gait; that plaintiff did not look or listen; and that the light was sufficient

to enable him to see the train had be looked. There was, however, persuasive evidence to the contrary, it appearing, among other things, that it was somewhat cloudy to the northwest, that some of those who observed the train, from points at or near the station, saw it but dimly, and plaintiff's testimony to the effect of driving slowly after passing the automobile being corroborated by disinterested bystanders. After reading the record and examining photographs of the *locus in quo*, we are by no means assured that, if plaintiff had looked continuously to the north while on Otley avenue, he would have seen the train. Taking into account the time, obstructions to view, the dark color of the unlighted train, with like background, its oblique approach, and, as the jury might have found, absence of warning signals, the train might reasonably have escaped plaintiff's notice. Nor can it be held as a matter of law that plaintiff should have stopped his team before attempting to cross. Upon the whole record we think the question of contributory negligence was for the jury. See *Campbell v. Northern Pac. Ry. Co.* 122 Minn. 102, 141 N. W. 855.

3. Error is assigned because the court charged that defendant had the burden of proving contributory negligence. Such is claimed to be contrary to the law of Iowa, where the accident occurred. This, however, was not pleaded. Furthermore, burden of proof pertains to the remedy, and is controlled by the rule in this state. *Jones v. Chicago, St. P. M. & O. Ry. Co.* 80 Minn. 488, 83 N. W. 446, 49 L.R.A. 640. See also *Kaufman v. Barbour*, 98 Minn. 158, 159, 107 N. W. 1128; *Fryklund v. Great Northern Ry. Co.* 101 Minn. 37, 39, 111 N. W. 727.

4. Excessiveness of damages is claimed. Plaintiff suffered loss of his right arm and leg, several teeth, and minor hurts; but fully recovered his general health. For several years prior to the accident he had worked as a farm-hand for \$420 a year, and board, lodging and laundry work. We find no ground for interfering with the verdict as reduced.

Order affirmed.

JOSEPH I. MAGNUSON and Another v. ROBERT BURGESS  
and Another.<sup>1</sup>

January 23, 1914.

Nos. 18,377—(211).

**Fraud — election of remedy.**

1. Where the sale of property is effected by fraud and deceit, the defrauded party may rescind the contract on discovering the fraud, or affirm the same and retain the property.

**Measure of damages.**

2. Where he elects to affirm the contract by retaining the property, the measure of his damages for the fraud is the difference between the actual value of the property and the price paid, together with such special damage as he may have suffered in consequence of the fraud.

**Depreciation in value of use.**

3. Even though the property be sold for a particular use, the defrauded party, where he affirms the contract, can have no recovery for depreciation in the value of the use of the property, accruing after discovery of the fraud.

**Verdict — evidence.**

4. Evidence *held* to support the verdict, and that there were no errors in the exclusion or admission of evidence.

Action in the district court for Cook county to recover \$1,400 for fraudulent representations in the sale of a stallion. The case was tried before Nelson, J., and a jury which returned a verdict for \$1,200 in favor of plaintiffs. From an order denying their motion for a new trial, defendants appealed. Affirmed on condition plaintiffs consent to a reduction of the verdict to \$600.

*Barnett & Richardson*, for appellants.

*E. H. Canfield*, for respondent.

<sup>1</sup> Reported in 145 N. W. 32.

BROWN, C. J.

Appeal from an order denying a new trial after verdict for plaintiffs.

The short facts are as follows: In February, 1906, defendants sold and delivered to plaintiffs, for the consideration of \$1,200, a horse represented to be a registered full-blood imported Belgian stallion, named "Jupiter d'Orm." The horse was purchased by plaintiffs for breeding purposes. At the time of the sale defendants delivered to plaintiffs certain pedigree papers and certificates, in and by which it was certified by an American horse-breeders association, and by a like Belgian association, that the horse was Jupiter d'Orm, was foaled in Belgium, and imported to this country by defendants. Plaintiffs thereafter made use of the horse for breeding purposes, and in the belief that he was the animal represented, and charged compensation for his services accordingly. They made application to register the horse in the books of the Minnesota Breeders Association, an organization authorized by chapter 436, p. 618, Laws 1907, and the application was refused, for the reason, as we understand the record, that the certificates of pedigree delivered to plaintiffs at the time of the sale, and which were presented to the association in connection with the application, were not sufficient to warrant the conclusion that plaintiffs' horse was the one therein described. At about this time, and by refusal of this board to register the horse, plaintiffs discovered, as they now claim, that the horse delivered to them was not the one bargained for, was not Jupiter d'Orm, or an imported animal, on the contrary was what is known in the horse-market as a grade stallion. Plaintiffs did not, at the time of making this discovery, or at any subsequent time, offer to rescind the contract by returning the horse to defendants, or otherwise, but continued to make use of him for the purposes for which he was purchased until April, 1912, when this action was commenced. The complaint alleges that at the time of the sale and as a part of the transaction defendants represented that the horse was a full-blood imported Belgian named Jupiter d'Orm, and duly registered as such in the books of an American Association of Imported Belgian Horses, and also by a similar association in Belgium, certificates from which

associations were delivered with the horse. The complaint further alleges that the representations so made were false and fraudulent and known to be so by defendants; that the certificates of pedigree so delivered were spurious and did not belong to the horse delivered to plaintiffs. The complaint also alleges that proper certificates of pedigree are essential to the value of such horses, and that, by reason of the spurious character of the certificates delivered to plaintiffs, they were specially damaged in the sum of \$800; and also that, upon discovering the fraud, plaintiffs were compelled to reduce the charge for the services of the horse to that usually charged for grade animals, in consequence of which plaintiffs were further damaged during the years 1909, 1910 and 1911, in the sum of \$800; the horse is alleged to be of no greater value than \$600. The answer admitted the sale of the horse as alleged in the complaint, and that the horse was represented as an imported Belgian, known as Jupiter d'Orm, and alleged that the representations were in all respects true, and that defendants in fact delivered the horse described in the certificates of pedigree to plaintiffs.

Plaintiffs had a verdict for \$1,200, the full amount of the purchase price of the horse, though the evidence tended to show that he was of the value, as a grade stallion, of the sum of \$400; the complaint alleged that he was worth no more than \$600. The amount of the verdict is explained by the fact that the court permitted the jury to include in their award of damages the loss claimed by plaintiffs to have been suffered after discovery of the fraud by the reduction in the service charges of the horse. Defendants moved for a new trial upon various grounds, and the motion was in all things denied.

The assignments of error present three principal questions, namely: (1) Whether the evidence supports the verdict; (2) whether the court erred in the admission of evidence, and, (3) whether the court erred in permitting the jury to include in plaintiffs' damages the alleged loss in service charges after discovery of the fraud.

1. The issues presented by the pleadings narrowed down at the trial to the question whether plaintiffs received the horse Jupiter d'Orm. The evidence leaves no fair doubt of the fact that Jupiter d'Orm was a full-blood Belgian stallion, and that he was imported

from Belgium by defendants in August, 1905, nor was there any issue under the pleadings concerning the representations made by defendants at the time of the sale, though their truth or falsity was in issue. The principal question litigated was whether the particular horse was the one delivered to plaintiffs. Defendants insisted that the identical horse was delivered, while plaintiffs contended to the contrary. There was no claim by defendants that a mistake had been made and the wrong horse delivered. On the contrary, the evidence offered tended to show that they were thoroughly familiar with this horse and by their evidence traced him from Belgium to this country and into the possession of plaintiffs. So that if the horse Jupiter d'Orm was not in fact delivered to plaintiffs, but some other horse, the falsity of the representations appears, entitling plaintiffs to a recovery of such damages as they suffered in consequence thereof. The jury found that the particular horse was not delivered to plaintiffs, and defendants' first contention on this appeal is that the verdict is not sustained by the evidence. We have given this contention due consideration, examined the record with care, with the result that in our opinion the question was properly submitted to the jury. The evidence does not perhaps leave the question entirely free from doubt, but since the trial court has approved the verdict, we are not justified, within the rule guiding us in such cases, in ordering a new trial upon this ground. We do not attempt to discuss the evidence for the purpose of demonstrating the correctness of the verdict. This we are not required to do, and in the instant case it would serve no useful purpose. We are content with the statement that the record has been fully considered, with the result stated.

2. Several assignments challenge the rulings of the court upon the admission and exclusion of evidence. Though some of the rulings of the court may have been erroneous, and some of the evidence excluded might properly have been admitted, and some that was admitted might have been excluded, without error, we find no error of a character to justify a reversal of the case, except as respects the measure of damages. Assignments 1 and 2 have reference to the admission of evidence, showing the representations made by defendants



at the time of the sale, the contention being that such evidence tended to enlarge the representations contained in the written bill of sale and guaranty, and was therefore inadmissible. There was no error in this ruling. As we read the pleadings there was no substantial controversy about the representations, which were to the effect that the horse sold and delivered to plaintiffs was the horse Jupiter d'Orm. And the trial reduced this branch of the case to a question of identity of the horse. Plaintiffs produced witnesses who gave evidence of the value of the horse received by plaintiffs, and of the admission of this testimony defendants complain, the ground of objection being that the witnesses were not shown to be competent to testify upon the subject. This question was addressed largely to the discretion of the trial court, in the exercise of which we discover no abuse. Defendants offered to show by the secretary of the American Breeders Association the identity of the description of the horse Jupiter d'Orm, as contained in the foreign certificate of pedigree, and as contained in the certificate issued by the association of which the witness was secretary. There was no error in the rejection of this testimony. It was immaterial. There was no controversy but that Jupiter d'Orm was a Belgian stallion, and it may be conceded that the particular horse was similarly described in both certificates, though there may have been some controversy upon the question. But the evidence offered would have no tendency to show that the horse so described was the animal delivered to plaintiffs. The same may be said of the exclusion of Exhibits 7, 8, 9 and 10, which are corroborative and tended to substantiate the claim that Jupiter d'Orm had been imported from Belgium by defendants. The examination of witness Montgomery, secretary of the Minnesota Breeders Association, may have in some measure encroached upon the rule of hearsay evidence, but not to such an extent that it may be said to have substantially prejudiced defendants' cause. The witness did not undertake to say whether plaintiffs received the horse they purchased. His testimony related almost wholly to an explanation why his association refused registration to the horse Jupiter d'Orm, and that appears to have been for the reason that the pedigree certi-

cates given plaintiffs had been altered and changed to such an extent as to leave the verity of the certificates in doubt.

3. The other assignments have reference to the damages awarded plaintiffs by the jury, and present a meritorious question. Plaintiffs were permitted to recover, in addition to the difference in value of the horse, the alleged loss in service charges incurred after the discovery of the fraud and during the years 1909, 1910 and 1911. In this we hold that the court below was in error; the alleged loss in service charges should have been excluded.

The law is well settled that, in the case of a breach of an ordinary warranty of the condition or quality of personal property, where the purchaser retains the property, the general rule of damages is the difference in value of the property in the condition or of the character represented and its value in fact. 3 Dunnell, Minn. Dig. § 8624. While in the case of fraud and deceit, where the property is not returned, the rule is the difference between the actual value and the price paid, and such special damages as resulted approximately from the fraud. *Marsh v. Webber*, 16 Minn. 375 (418); 1 Notes on Minn. Reports, 680. *Stickney v. Jordan*, 47 Minn. 262, 49 N. W. 980; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563. In cases of this character the special damages are necessarily limited to such as occurred prior to a discovery of the fraud, and of the fact that the property was not of the character represented or suited to the purposes intended. For it is clear that the defrauded party, after discovering the fraud, cannot retain the property and claim special injury thereafter. In the case at bar the horse was purchased for breeding purposes, and he was represented as a Belgian stallion. Plaintiffs discovered that the horse was not as represented and that they had been defrauded early in the year 1909, and thereafter made use of the animal as a grade stallion, at reduced service charges. There is no claim that plaintiffs suffered any loss in consequence of this fact prior to 1909, and we have been cited to no case holding that in such a state of facts recovery may be had for losses of this kind, occurring after notice of the facts. Upon a discovery of the fraud in such cases the defrauded party has the election of one of two remedies, namely: (1) Rescind the contract by returning or offering to

return the property, and recover back the purchase price, together with such special damages as he may be entitled to, and (2) affirm the contract by retaining the property, and claiming the difference in value, with special damages if any. Where the election is to affirm the contract, the property becomes absolutely and fully vested in the purchaser, and the seller is no longer liable for injuries suffered from its use, or its failure to correspond with the representations as to character or usefulness. In other words, the purchaser in such case elects to take the property with knowledge of its actual condition, and to reimbursement by a recovery of the difference in value, and such special damage as may have accrued up to the date of making the election. 2 Mechem, Sales, 1843; 24 Am. & Eng. Enc. (2d ed.) 1157, et seq; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; Mlnazek v. Libera, 83 Minn. 288, 86 N. W. 100. After discovery of the fraud the defrauded party has a reasonable time in which to make his election, and when made it is final, and ends the relation between the parties as to the future, in respect to the particular transaction. Peak v. Frost, 162 Mass. 298, 38 N. E. 518. In the case at bar plaintiffs elected to affirm the contract, that is, there is no claim that they attempted to rescind the same upon the discovery of the fraud, and they still hold the horse. They cannot therefore recover special damages subsequently accruing, and the court was in error in its charge to the jury upon the question.

4. But we deem it unnecessary to order a new trial for this error, for a reduction of the verdict may be ordered which will end the litigation. The complaint alleged that the horse was of no greater value than \$600, and the evidence tended to show that he was worth no more than \$400. Just what value the jury placed upon the horse is, of course, not made clear by the record, but it may be assumed that they adopted the value admitted by the complaint, and that the balance of the verdict of \$1,200 represents the loss suffered after discovery of the fraud. Such being the case, a reduction of the verdict to \$600 will meet the ends of justice and bring the litigation to a close.

It is therefore ordered that the order appealed from be reversed and a new trial granted, unless plaintiffs shall, within 10 days after

the cause is remanded, elect to reduce the verdict accordingly, and remit therefrom the sum of \$600, taking judgment for a like amount, with interest since the date of the verdict. If such election is made, the order appealed from will be and it is affirmed.

It is so ordered.

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**HAROLD C. STEVENS v. MINNEAPOLIS FIRE  
DEPARTMENT RELIEF ASSOCIATION.<sup>1</sup>**

January 23, 1914.

Nos. 18,379—(248).

**Relief association — right of member to pension.**

1. Where a member of the Minneapolis Fire Department Relief Association, an organization formed under the general laws of the State for the relief of disabled members of the Minneapolis Fire Department, is determined by the association to be disabled within the meaning of its constitution and by-laws and is granted a pension as therein provided, his right to the pension is a vested legal right of which he cannot be deprived except by due process of law, namely, by notice and opportunity to be heard in any proceedings had by the association for the purpose of terminating his rights.

**Recovery from disability — finding not conclusive.**

2. A determination by the association that a member thereof previously entered upon the pension rolls has fully recovered from his disability is not final and conclusive where the member had no notice and was not afforded an opportunity to be heard upon the question.

**Law of mutual benefit society applies.**

3. The rights of the parties are analogous to and controlled by the principles of law applicable to mutual benefit societies.

**Findings sustained by evidence.**

4. Findings of the trial court *held* sustained by the evidence.

<sup>1</sup> Reported in 145 N. W. 35.

Action in the district court for Hennepin county to recover \$10 per month from defendant between May, 1903, and May, 1907, and to determine that plaintiff is a pensioner of the second class and to recover a pension at the rate of \$25 per month from May, 1907. The facts are stated in the opinion. The case was tried before Hale, J., who made findings and ordered judgment in favor of plaintiff for \$15 per month from May, 1907. From the judgment entered pursuant to the order for judgment, defendant appealed. **Affirmed.**

*G. A. Will*, for appellant.

*John J. McHale*, for respondent.

BROWN, C. J.

The pleadings and evidence in this case disclose the following facts: Defendant is an association organized under the general laws of the state (chapter 58, R. L. 1905, chapter 24, p. 30, Laws 1907)<sup>1</sup> for the relief of disabled members of the Minneapolis fire department, and of their families in case of death, resulting from the performance of their duties as firemen. Plaintiff was a member of the fire department serving in different capacities from September, 1895, to February 28, 1902. From injuries and exposure in the performance of his duties he became disabled from the further discharge thereof and was by the relief association placed upon its pension rolls as entitled to certain monthly allowances for his support. The proceedings had for this purpose were in all things regular and plaintiff thereafter drew from the association the amount of the pension granted him until May 27, 1907. On that date the association, acting through its board of trustees, in proceedings had for the purpose, determined that plaintiff had fully recovered from his disability and his name was ordered stricken from the pension rolls, and further payments were thereafter refused. Plaintiff was not informed of this proceeding and subsequently interposed objections to his removal, and applied for re-instatement which was refused. This action was thereafter brought to recover the amount due under the pension allowance from the date of the suspension, the theory of the action being that the removal of plaintiff as a pensioner was without right and was wrongful and unlawful and a violation of

<sup>1</sup>G. S. 1913, § 3348.

plaintiff's rights in the premises. Defendant answered to the merits, insisting that plaintiff had recovered from his disability and that the removal was not only justified but required by the laws of the association. The principal issue litigated on the trial centered around the question whether plaintiff had recovered and was therefore no longer entitled to a pension from the association. The trial court found as a fact that he had not so recovered, was still, at the time of the trial, suffering from the disability for which the pension was granted, that the action of the association in removing plaintiff was not justified by the facts, and judgment was ordered for plaintiff accordingly. Defendant appealed.

The assignments of error present the questions whether the findings of the trial court are sustained by the evidence, and whether the decision rendered is contrary to law. Whether the action of the association in removing plaintiff from the list of pensioned members can be reviewed in this manner, or whether to entitle plaintiff to recover he should first by some appropriate proceeding be restored to membership, are questions which were not raised by the pleadings or on the trial and are not therefore considered. We limit our consideration solely to the two questions mentioned above. It is contended that the decision of the court below is contrary to law for the reasons: (1) That the pension granted by the association to sick and disabled firemen is a mere gratuity, in which the pensioner has no vested right, and may be withdrawn or discontinued at pleasure, and (2) that the determination by the association, through its board of trustees, that plaintiff had fully recovered from the disability for which the pension was granted, is final; at least that the action of defendant in this respect is open to review by the courts only when the power of removal has been greatly abused.

1. The contention that the pension is a mere gratuity to be granted or discontinued at the pleasure of the association is not sustained. The association was formed under authority of law, and for the purpose of affording in a measure indemnity and protection to firemen, who, in the performance of their duties, suffer injuries which render them incapable of continuing their duties or of performing other manual labor. The funds from which the pensions are paid are

contributed by the state and the city of Minneapolis, and from dues and assessments imposed upon the members of the fire department. Every fireman in good standing and meeting the requirements of the regulations of the association is entitled as a matter of legal right to a place on the pension rolls whenever disabled to the extent declared by the laws of the association. *Buckendorf v. Minneapolis Fire Dep. Relief Assn.* 112 Minn. 298, 127 N. W. 1053, 1133. The creation of the pension fund was intended for the protection of disabled firemen, and of their families when death resulted from the discharge of their duties, and forms an inducement to qualified persons to become and continue members of the fire department. Each fireman contributes to the fund in the form of annual dues of \$8, and this, if there be no other reason, vests in him substantial rights of which he cannot be deprived except by due process of law. The constitution and by-laws of the association provide that the disabled member *shall* be paid the amount of pension money appropriate to his class, and neither the allowance nor payment is left to the arbitrary discretion of the officers of the association. The situation is wholly unlike the ordinary pension, such as that granted by the Federal government to dependent soldiers of the Civil War, for there the pension is a mere gratuity or bounty which may be taken away at any moment. *Walton v. Cotton*, 60 U. S. [19 How.] 355, 15 L. ed. 658; *U. S. v. Teller*, 107 U. S. 64, 2 Sup. Ct. 39, 27 L. ed. 352. In the case at bar the pension fund is created in part by the payment of dues by the members of the fire department, who may ultimately become pensioners, and the rights acquired by the fireman are analogous to those possessed by members of mutual benefit societies. 28 Cyc. 555. We therefore hold that the pension in question is not, as contended by the appellant, a mere gratuity to be granted or withheld at the whim or pleasure of the association.

2. The contention that the determination by the association that plaintiff had fully recovered from his disability is conclusive and not reviewable by the court is not sustained. From what has been said in reference to the rights acquired by members of the fire department, it follows that they have certain vested rights in and to the relief which the association may not arbitrarily destroy. While

it is true that the articles of association and the by-laws provide that the determination by the association of questions of disability and injury is final and conclusive, those provisions must be construed in the light of the legal rights of the parties, and in harmony with the fundamental doctrine that no person can be deprived of his property or property rights except by due process of law; and this means notice and opportunity to be heard. There is no claim that plaintiff was afforded this opportunity, and it does not appear that he was notified of the time or place when or at which the trustees of the association would hear and determine the question of plaintiff's restoration to health. If notice had been given plaintiff and he had thus been afforded an opportunity to be heard, the determination of the association that he had been restored to health and therefore should be dropped from the pension roll, if not final and conclusive by contract stipulation as declared by the laws of the association, should be interfered with by the court only on a clear showing of manifest arbitrary action on the part of the association. *Karb v. State*, 54 Oh. St. 383, 43 N. E. 920; *People v. Board of Trustees of Fireman's Pension Fund*, 95 Ill. App. 300; *People v. Scannell*, 34 Misc. 709, 70 N. Y. Supp. 1042; 28 Cyc. 555. It is clear that in determining the question whether a member shall be dropped from the pension list, and thereby deprived of the benefits conferred and vested thereby, the association acts in at least a quasi-judicial capacity, for the determination affects the vested legal rights of the pensioner, and he should be afforded an opportunity to protect and defend those rights. 10 Am. & Eng. Enc. (2d ed.) 296, et seq; *State v. Dunn*, 86 Minn. 301, 90 N. W. 772. It follows then, for the reasons stated, that the determination of the question of his removal is not conclusive.

3. The contention that the evidence fails to support the findings requires no extended discussion. It is doubtful, since plaintiff was not given a hearing, whether the action of the association in striking his name from the pension list, is of any validity whatever, yet it may be conceded for the purposes of this case that the order of the association was valid and, until set aside in this or some other form of action, binding upon plaintiff. However, it does not appear that



plaintiff was given an opportunity to be heard in the matter, the rule limiting the right of the courts to set the determination aside to instances of manifestly arbitrary action by the association does not apply. This is necessarily so for the reason that defendant failed, by not giving to plaintiff an opportunity to be heard, to render applicable the finality rule of its by-laws, for they must be construed as requiring such notice and opportunity, and there is therein no provision for a review of questions of the kind. In this situation the court below was controlled by the rule of preponderance of the evidence, and we are controlled by the usual rule applicable to the review of questions of fact. In this light we have examined the evidence and find no reason for holding that the findings are clearly and palpably against the evidence.

Judgment affirmed.

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**M. W. SVENSSON v. PETER LINDGREN.<sup>1</sup>**

January 23, 1914.

Nos. 18,395—(214).

**Competency of witness — offer insufficient.**

1. Offer to show incompetency of witness, under G. S. 1913, § 8378, to testify to conversations with plaintiff's intestate, on the ground of interest "in the event" of the action by reason of agreement to pay the note sued on, *held* insufficient as importing merely a nudum pactum.

**Exclusion of evidence — error.**

2. Rejection of plaintiff's proffer of conversations had with defendant and his wife after maturity of the note in suit, involving admission of liability and tending to contradict and discredit their testimony, *held* reversible error.

**Charge to jury.**

3. Instruction *held* fatally erroneous as directing the jury, in effect, to disregard arguments of counsel.

<sup>1</sup> Reported in 145 N. W. 116.

Action in the district court for Ramsey county by the administrator of the estate of John Pearson, deceased, to recover \$200 upon a promissory note. The case was tried before Catlin, J., and a jury which returned a verdict in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

*Harold Harris*, for appellant.

*David F. Peebles* and *P. A. Cosgrove*, for respondent.

PHILIP E. BROWN, J.

Action to recover the amount of a promissory note of date March 9, 1910, due November 1, 1910, bearing interest at six per cent per annum, and executed by defendant to plaintiff's intestate; defense, want of consideration; verdict for defendant. Plaintiff appealed from an order denying a new trial.

The errors assigned relate solely to admissions and exclusions of evidence and charge.

1. Defendant propounded to his wife, produced by him as a witness and testifying in his behalf, questions seeking to elicit conversations, claimed to have occurred between her and deceased and between the latter and defendant in her presence, concerning the consideration for the note, and which, if she was "interested in the event" of the action, were incompetent under G. S. 1913, § 8378, excluding evidence, by one so interested, of conversations with and admissions of a deceased person relative to matters at issue. Plaintiff objected to her so testifying on the ground of statutory disqualification, and in this connection offered to prove declarations by her to the effect that if the note were collected she would have to pay it, that she had taken it and the negotiations in regard to its payment into her hands, and had requested extension and "agreed at different times to pay it." On defendant's objection, the proffer was rejected, and plaintiff assigns error.

The burden rests on an objecting party to make the incompetency of a witness clearly appear, and the disqualifying interest must be pecuniary, legal, certain and immediate, in the event of the cause itself. Dunnell, Minn. Prac. § 710. Furthermore, offers of evidence must be sufficiently full and explicit to enable the court to see

therefrom, in connection with that already introduced, that something material will be disclosed. 3 Dunnell, Minn. Dig. § 9717. Assuming then, without deciding, that a binding agreement by the witness to pay the note would render her "interested," the offer was nevertheless insufficient as importing merely a nudum pactum, which would not disqualify.

2. Defendant testified in substance, his wife corroborating, that he gave the note to obtain funds to pay a mortgage on his property, maturing in November, 1910, deceased agreeing to send him the amount of the note later from the state of Washington where he resided, but failing so to do. Plaintiff, in rebuttal, sought to show conversations had with these witnesses long after maturity of the note, to the effect that, being then unable to pay, they requested and obtained extension of time of payment, agreeing, if given time, to take care of the note. The court, however, ruled such testimony improper as tending merely to establish admissions irrelevant to the issue of lack of consideration. This was error. The case was close on the facts, as may, perhaps, best be indicated by the following excerpts from the charge:

"As to the exact fact as to whether there was or was not a consideration here is not shown by one particle of testimony one way or the other, but you have a right to apply your judgment and your experience and your ordinary intelligence to all the facts which are presented by this testimony, take into consideration the statement of all the witnesses, including the wife of this man, and from all those circumstances determine whether this man took this note for the purpose of sending the money to St. Paul from Washington along in November to help them out on this mortgage;" and,

It "is for you alone to determine from all these facts and all this meager testimony and fragments that were gathered on the witness stand" whether there was consideration for the note.

And obviously plaintiff, being unable to present deceased's version of the transaction, was forced to rebut defendant's claims largely, if at all, by proof of the latter's conduct and admissions, which under plaintiff's offer were clearly relevant, not only as being inconsistent with the testimony of defendant and his wife but also as tending to

discredit it, and were furthermore not rendered inadmissible by their connection with plaintiff's attempts to collect. While, therefore, we are averse to reversals for error in exclusions of evidence, except where its admission might reasonably have resulted in a different verdict, we are satisfied that such a case is here presented.

3. The charge contains the following:

"But preponderance of testimony does not mean the quantity of testimony or the number of witnesses produced by either side, it does not mean that the jury is to consider anything that has been said by counsel in this case, because each counsel is doing the best he can to bring out his case and may have said some things he didn't necessarily expect the jury to believe, but at all events, whether they did or whether they did not, all the jury has to pass upon is the evidence of the witnesses and the papers and exhibits that have been received, and *the arguments and remarks made by counsel must be forgotten by the jury when they retire into the jury-room; that has nothing to do with this case;*" the portion in italics being excepted to in the motion for a new trial, but not before, and the effect of the part quoted not being in any way changed or modified by the rest of the charge.

G. S. 1913, § 7799, gives the absolute right to argue a case before the jury, who are required to accept the law as given by the court. The direction excepted to, therefore, was erroneous and prejudicial; for while trial courts must be given latitude in calling attention to improper and irrelevant argument, they cannot be allowed to nullify the statute, as occurred here. As declared in Puett v. Caldwell & N. R. Co. 141 N. C. 332, 335, 53 S. E. 852, 854:

"The judge has a large discretion in controlling and directing the argument of counsel, but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case."

And, as stated in 2 Standard Enc. Proc. 828: "An instruction is erroneous which tells or practically tells the jury to disregard the arguments of counsel." See, also, the Chicago Union Trac. Co. v.

O'Brien, 219 Ill. 303, 307, 76 N. E. 341; *People v. Ambach*, 247 Ill. 451, 457, 93 N. E. 310.

Upon the error here involved, plaintiff's failure to object or except on the trial is of no consequence.

Other assignments of error require no mention, many being without merit and none of the questions raised being likely to recur on new trial.

Order reversed.

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## MOTEL OXMON v. MODERN WOODMEN OF AMERICA.<sup>1</sup>

January 23, 1914.

Nos. 18,408—(190).

### **Foreign beneficiary association — vacating service of summons.**

Section 3555, G. S. 1913, authorizing service of process upon a foreign beneficiary association by serving the same upon the insurance commissioner, provides "that no such service shall be valid or binding against any such association, when it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of such service." The summons in question required defendant to answer within 20 days from service thereof, and judgment by default was entered 22 days after such service. *Held*: That such service and such judgment are not binding upon defendant and must be set aside.

Action in the district court for Ramsey county to recover \$1,000 upon defendant's policy of insurance. Defendant appeared specially and moved to set aside the pretended service of the summons. From three orders, Catlin, J., denying as many motions to set aside the service of summons, defendant appealed. Reversed.

*Benjamin D. Smith* and *Percy D. Godfrey*, for appellant.

*James E. Markham* and *Benjamin Calmenson*, for respondent.

<sup>1</sup> Reported in 145 N. W. 171.

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Note.—As to service of process on insurance commissioner, see note in 23 L.R.A. 499.

TAYLOR, C.

Defendant is a fraternal beneficiary association incorporated under the laws of the state of Illinois. Plaintiff brought suit against it upon a policy of insurance issued upon the life of her husband and payable to herself, and caused the summons and complaint to be served upon the insurance commissioner. The summons required defendant to answer within 20 days after such service. Twenty-two days thereafter, no answer having been interposed, judgment was entered by default. The statute governing the service of the summons in such cases provides "that no such service shall be valid or binding against any such association, when it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of such service." Section 3555, G. S. 1913. Thirty-six days after the service of the summons, defendant appeared specially and moved for an order setting aside such service on the ground that the summons was illegal and void. This motion was denied. Thereafter defendant again appeared specially and moved for an order setting aside the summons and the service thereof, and determining that the same was not valid or binding upon defendant, for the reason that it required defendant to answer within less than 30 days after the date of such service. This motion was also denied. Thereafter, by leave of court, defendant again appeared specially, and moved for an order setting aside the summons and the service thereof and vacating the judgment entered thereon, and determining that said summons and said judgment were not valid or binding against defendant, for the reason that defendant was required to answer within less than 30 days after the service of such summons. Upon this motion it was made to appear that the summons and complaint had been lost and that no answer was made within the 20 days, for the reason that defendant's attorneys and officers did not know of the pendency of the suit, and that defendant was willing to appear, answer and try the case without delay if permitted to do so. This motion was also denied. Defendant appealed separately from each of the three orders.

Defendant has not invoked the discretionary power of the court to grant it relief, and the question presented is whether it is entitled

to the relief sought as a matter of right. Plaintiff relies upon *Lockway v. Modern Woodmen of America*, 116 Minn. 115, 133 N. W. 398, to support her contention that the judgment is valid. In that case the summons required the defendant to answer within 20 days, and the trial court permitted the plaintiff therein to amend the summons by striking out 20 days and inserting in lieu thereof 30 days. This court with some hesitation affirmed the action of the trial court. The decision goes no further than to sanction the allowance of such an amendment upon proper application therefor, and cannot be extended. The court did not hold that a summons which failed to comply with the requirements of the statute was sufficient, or that a valid judgment could be entered thereon; but merely that the court possessed the power, in a proper case, to permit the summons to be amended so as to conform to the statute. The statute provides "that no such service shall be valid or binding against any such association, when it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of such service." The statute from which this excerpt is taken provides the only method for acquiring jurisdiction of such associations and is constitutional. *Spencer v. Court of Honor*, 120 Minn. 422, 139 N. W. 815. To hold that the service of a summons is binding upon defendant and the judgment entered thereon valid, when the statute expressly declares that such service shall not be valid or binding, would annul the statute. This the court cannot do. In the *Lockway* case the court held that a defect, such as here existed, could be cured by amendment, and we cannot go further and hold that such a summons is sufficient without amendment. The authorities which discuss the effect of irregularities in the process by which courts acquire jurisdiction are not in point, for the statute expressly declares the effect to be given to the irregularity here in question.

The several orders appealed from are reversed.

HALLAM, J., (dissenting).

I fully agree that the judgment should be vacated. The summons required the defendant to answer in 20 days instead of 30 days, as the statute provides, and the judgment was entered 22 days after

the summons was served. Defendant was entitled to have the judgment set aside upon motion as a matter of right. 1 Freeman, Judgments, § 97; Remnant v. Hoffman, 11 Pac. 319 (see 69 Cal. xv). See Stocking v. Hanson, 22 Minn. 542.

The opinion goes further and in terms holds that the trial court should have granted the first motion to set aside the service of the summons "on the ground that the summons was illegal and void." In Lockway v. Modern Woodmen of America, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555, an action against this same defendant, in which the same form of summons was served, the trial court denied a motion "to set aside the summons and the service thereof," held that the defect "could be cured by amendment," and on the hearing permitted the summons to be amended by inserting "thirty" days instead of "twenty," and allowed the action to proceed. This amendment was necessary to save the cause of action from the bar of the statute of limitations. On appeal the trial court was sustained.

Yet the Lockway case is not here overruled. Taking the opinion in this case and the opinion in the Lockway case together, it appears to me the court is committed to the proposition that a summons, not merely irregular but void, is subject to amendment. This is contrary to well-settled principles of law. If the decision in the Lockway case is permitted to stand, this summons should not be held void.

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## JOHN G. KRUEGER v. EDWARD MARKET.<sup>1</sup>

January 23, 1914.

Nos. 18,474—(299).

### Adverse possession.

1. To establish title to real estate by adverse possession, such possession must be shown for the full statutory period of 15 years.

<sup>1</sup> Reported in 145 N. W. 30.

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Note.—As to the effect of abandonment on title to real property acquired by adverse possession, see note in 24 L.R.A. (N.S.) 1161.



**Same — Insufficient evidence.**

2. To constitute adverse possession, the possessory acts must appear upon the land itself and be such as to indicate an intention to appropriate it permanently. Giving permission to a third party to cut hoop poles thereon and receiving pay for such poles is not sufficient to establish such possession.

**Same — payment of taxes.**

3. The payment of taxes, although evidence of a claim of title, is not evidence of adverse possession.

**Abandonment.**

4. A perfect legal title to real estate is never lost by abandonment.

Action in the district court for Rice county to determine adverse claims. The facts are stated in the opinion. The case was tried before Childress, J., who found that plaintiff was the owner in fee simple of the premises described at the beginning of the opinion. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

*John F. Byers* and *S. R. Child*, for appellant.

*E. H. Gipson*, for respondent.

**TAYLOR, C.**

Plaintiff brought this action to determine adverse claims to the south half of the northeast quarter of the northeast quarter of section 17 in township 110 of range 20, and other adjoining lands, all situate in the county of Rice, and alleged that he was the owner and in the actual possession of the same. Defendant interposed an answer, in which he admitted plaintiff's possession, but set forth a complete chain of title to himself from the United States for the 20-acre tract above described; and alleged that he was the owner and entitled to the possession thereof, and asked judgment that he recover such possession. Plaintiff in reply admitted defendant's chain of title, but alleged that he and his predecessors in interest had been in actual adverse possession of the land for more than 15 years before the commencement of the action. At the trial plaintiff relied solely upon the claim of adverse possession to establish his title. Defendant is the owner of the land, unless his title has been

divested by such adverse possession. The trial court found as a fact that plaintiff and his predecessors in interest had been in the actual adverse possession of the land for more than 15 years immediately preceding the commencement of the action, and rendered judgment, decreeing that plaintiff was the owner in fee simple thereof and that defendant had no interest therein. Defendant appealed from the judgment. The sole question presented is whether the evidence is sufficient to sustain the above finding.

The land lies along the river and is of little value. Some seven or eight acres are steep, rocky bluffs, covered with brush and small trees not large enough for timber; and the remainder is low bottom-land, covered with sand deposits, intersected by bayous, and frequently overflowed. It is used only for pasturage.

A tax-assignment certificate for the land was issued to A. D. Keyes on October 30, 1883, and was assigned by him to E. L. Frink and others, on November 28, 1885. The claim of his associates passed to Frink, and Frink deeded to John Dungay on December 24, 1896. Dungay deeded to Frank Sweet on April 27, 1897, and Sweet deeded to Frank Tetrault on September 14, 1899, and Tetrault deeded to plaintiff on December 31, 1910. Plaintiff concedes that the tax certificate conveyed no title, but presented the certificate and the chain of conveyances thereunder to show the character and extent of his claim, and to connect his possession with that of his predecessors in interest. Plaintiff and his predecessors have paid the taxes upon the land since 1883.

Sweet testified that, between April 27, 1897, when he obtained his deed, and September 14, 1899, when he conveyed to Tetrault, he built some fence and cleared a portion of the land and used it for pasture. All that he states as to when these acts took place is that they were between the dates above given. From the time that Sweet entered thereon until the commencement of the action, the land was partially enclosed and used for pasture, and firewood was occasionally taken therefrom.

The action was begun in February, 1911, and to establish adverse possession for the statutory period of 15 years, such possession must

have been initiated as early as February, 1896, and more than a year before Sweet received his deed. Frink testified that he never saw the land, but that while he claimed it, he gave permission to one Gile to cut hoop-holes thereon, and that Gile made some payments for such poles. He did not know when these poles were cut, nor how many were cut, and had no personal knowledge that they were cut upon this land. The testimony as to the cutting of these hoop-poles is the only evidence tending to show any possessory acts on the part of any of plaintiff's predecessors prior to the entry upon the land made by Sweet; and the case is narrowed down to the question as to whether the cutting of these poles, coupled with the payment of taxes for many years, is sufficient to constitute an adverse possession which can be tacked to the adverse possession established by Sweet.

What constitutes adverse possession has been before this court many times and the rule is well stated as follows:

"The general rules of law as to adverse possession are well settled. It must be actual, visible, and exclusive, as well as hostile. The doctrine proceeds upon the theory of the acquiescence of the true owner in his disseisin for the full statutory period; hence, the possession which affects him is what appears on the ground itself. It must be such as would operate as unambiguous and unequivocal notice to him that some one is in possession in hostility to his title under claim of right; and, while much will depend on the nature and situation of the property and the uses to which it is adapted, yet in all cases it must be a possession which is accompanied with the real and effectual enjoyment of the property,—the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others. The acts must be such as indicate that a permanent occupation and appropriation of the premises is intended, as distinguished from a casual trespass for some temporary purpose. And, inasmuch as it is only the possession which appears on the ground which affects the true owner, it follows that, while such acts as paying taxes or surveying lines may characterize a possession, if it exists, as hostile, yet they do not themselves constitute

the possession which the law requires to toll the right of the true owner." *Wood v. Springer*, 45 Minn. 299, 47 N. W. 811.

"The acts of the person in possession must be such as to indicate that a permanent occupation and appropriation of the premises are intended, as distinguished from a casual trespass or occupancy for some temporary purpose." *Glover v. Sage*, 87 Minn. 526, 92 N. W. 471; *Young v. Grieb*, 95 Minn. 396, 104 N. W. 131; *Gaston v. May*, 120 Minn. 154, 138 N. W. 1025; *Costello v. Edson*, 44 Minn. 135, 46 N. W. 299; *Wood v. Springer*, 45 Minn. 299, 47 N. W. 811.

"The adverse possession which affects the rights of the true owner is what exists and appears on the land itself." Hence the payment of taxes, although evidence of a claim of title, is not evidence of adverse possession. *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Wood v. Springer*, 45 Minn. 299, 47 N. W. 811; *Young v. Grieb*, 95 Minn. 396, 104 N. W. 131. To constitute adverse possession there must, at all times, be some person against whom the owner may maintain an action to recover possession. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.* 45 Minn. 387, 48 N. W. 17.

"The mere cutting and removal of timber or fuel or natural grass from unoccupied land have not generally, and under ordinary circumstances, been regarded as constituting adverse possession." *Costello v. Edson*, 44 Minn. 135, 46 N. W. 299; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Washburn v. Cutter*, 17 Minn. 335 (361); *McRoberts v. McArthur*, 62 Minn. 310, 64 N. W. 903.

In the present case it is obvious that the cutting of the hoop-poles by Gile was not for the purpose of improving the land or preparing it for use, and did not differ in kind from the act of any trespasser who should appropriate to his own use some of the natural products growing thereon. Furthermore, so far as the evidence shows, the last of this cutting may have occurred many years before Sweet took possession. The evidence is wholly insufficient to establish adverse possession at any time prior to the entry upon the land made by Sweet, and, as plaintiff must show such possession for the full statutory period, he has failed to establish title.

The suggestion is made that, as defendant had failed to pay taxes for nearly 30 years, he had abandoned the land, and upon that

ground should be barred from now asserting title thereto. A perfect legal title to real estate may be divested by adverse possession under and by virtue of the statute of limitations, but is never lost by abandonment. *Smith v. Glover*, 50 Minn. 58, 75, 52 N. W. 210, 912; *Nauer v. Benham*, 45 Minn. 252, 47 N. W. 796; *Mayor, etc. of Philadelphia v. Riddle*, 25 Pa. St. 259; *Kreamer v. Voneida*, 213 Pa. St. 74, 62 Atl. 518; *East Tennessee Iron & Coal Co. v. Wiggin*, 68 Fed. (C. C. A.) 446, 15 C. C. A. 510; *Tennessee Oil, Gas & Mineral Co. v. Brown*, 131 Fed. (C. C. A.) 696, 699, 65 C. C. A. 524; *Barrett v. Kansas & T. Coal Co.* 70 Kan. 649, 79 Pac. 150; *Sharkey v. Candiani*, 48 Ore. 112, 85 Pac. 219, 7 L.R.A.(N.S.) 791; *Robie v. Sedgwick*, 35 Barb. 319; *Calloway v. Sanford*, (Tenn. Ch.) 35 S. W. 776, 778; 23 Am. & Eng. Enc. (2d ed.) 940.

Judgment reversed.

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## STATE v. S. A. McPHAIL.<sup>1</sup>

January 23, 1914.

Nos. 18,478—(28).

### **Membership in board of trade.**

1. A membership in the Duluth Board of Trade is property.

### **Taxable property.**

2. It is property which the legislature, under the Constitution of the state, might by appropriate laws tax.

### **Taxation of personal property.**

3. R. L. 1905, § 794, providing that all real and personal property in this state and all personal property of persons residing therein, except exempt property, is taxable, means that all personal property of whatever nature not exempt from taxation shall pay taxes. Under this section a membership in the Duluth Board of Trade was properly taxed as personal property of the member.

<sup>1</sup> Reported in 145 N. W. 108.

**Same.**

4. R. L. § 797, providing that "Personal property shall be construed to include," and naming 11 classes of property, does not exempt from taxation or render not subject to taxation personal property not included within any of the classes named.

**Construction of statute.**

5. There has been no such settled construction of the statutes referred to as to justify the application here of the doctrine of practical construction.

**Constitution.**

6. The taxation of such a membership does not violate any provision of the Federal or state Constitution.

In the matter of proceedings in the district court for St. Louis county to enforce collection of personal taxes within that county delinquent on April 1, 1912, defendant answered. The facts are stated in the opinion. The matter was tried before Dibell, J., who made findings and ordered judgment against defendant in the sum of \$15.97. From an order denying his motion for a new trial, defendant appealed. Affirmed.

*Francis W. Sullivan*, for appellant.

*Charles E. Adams*, for respondent.

BUNN, J.

Defendant on May 1, 1911, was the owner of one membership in the Duluth Board of Trade. The assessor of the city of Duluth on May 1, 1911, assessed this membership at the sum of \$500; \$100 was allowed defendant as an exemption, leaving a total assessment of \$400. Defendant protested against the assessment of such membership to the assessor, the board of equalization, and the board of review. In these proceedings to enforce the collection of personal property taxes for 1911, defendant answered the citation served upon him, and the issues were tried by the court. Its decision was that the membership was personal property subject to taxation, and properly taxed under the laws of this state. Defendant moved for a new trial. The motion was denied, and this appeal taken from the order.

1. The question at the threshold is whether a membership in the Duluth Board of Trade is personal property.

The general nature of the business of the Duluth Board of Trade is to establish and maintain uniformity in commercial usages; to enforce proper conduct in trade; to adjust controversies and disputes among its members; to acquire and disseminate valuable business information, and to furnish a commercial exchange at Duluth, Minnesota, in the furtherance of its business pursuits. The Board of Trade has no capital stock. It has a membership of 200, and a certificate of membership is issued to each member. It does not engage in the grain business for profit, but furnishes facilities and conveniences for the transaction of the grain business by its members. It owns and maintains a building and trading room, and furnishes to its members telegraphic and other information as to matters important in the grain trade; it keeps a record of actual transactions upon the board, provides means for arbitrating and settling differences, and does such things as facilitate trading in grain in the same general way as do the various exchanges and boards of trade throughout the country; its members are required to pay annual dues.

Membership in the Board of Trade can only be transferred upon certain conditions, expressed in the articles of incorporation, rules, and by-laws, all of which regulations are intended to prevent men of unfit business character and standing to become members of the board; but such memberships are bought and sold, and have a recognized fluctuating value from time to time and are used as collateral at the banks, and are valued by the Board of Trade in fixing the assets of one of its members. On May 1, 1911, a membership was of the value of from \$3,000 to \$3,500, and at times prior and after that date, the value ranged from \$3,000 to \$4,800. On May 1, 1911, the Duluth Board of Trade owned real, and tangible personal property of the value of \$450,000 to \$500,000, and taxes were assessed and paid thereon.

✓ We hold that a Board of Trade membership is property. We adopt as a part of this opinion the following succinct analysis of the question in the memorandum of the trial court: "There is no diffi-

culty in holding that a membership in the Board of Trade is property. It confers a right to do particular business in a particular and advantageous way. It brings the holder in contact with men with whom he may deal. The right to trade upon the floor of the board is substantially essential to the conduct of the grain buying and selling business. A membership has a use value and a buying and selling or market value. It is bought and sold. Its value is considered by the Board of Trade in determining the assets of a member. There is a lien upon it for balances due members. It is used as collateral at the banks. It passes by will or descent and by insolvency or bankruptcy. A few memberships represent in actual cash value more than the life-time savings of an ordinary active and thrifty man. It is true that there are certain restrictions in the ownership and use of a membership. These may increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property."

The authorities support this view. *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264, in which Mr. Justice Miller said there could be no doubt that a membership in the San Francisco Stock and Exchange Board was property. *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. ed. 915 (seat in New York Stock Exchange); *Page v. Edmunds*, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. ed. 318 (membership in Philadelphia Stock Exchange). In these cases it is held that such a membership is property, which passes to the trustee in bankruptcy of the member's estate, because it could be "transferred" by the member, was of decided value, and could be sold subject to election by the exchange. "While the property is peculiar and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors." *Sparhawk v. Yerkes*, *supra*. In *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301, it was held that a seat in the New York Cotton Exchange was property, and as such passed to a receiver in supplementary proceedings on execution against the owner. In *Platt v. Jones*, 96 N. Y. 24, a seat in the New York Stock Exchange was held property which passed to the owner's assignee in bankruptcy. In the *Matter of Hellman*, 174



N. Y. 254, 66 N. E. 809, 95 Am. St. 582, it was held that a seat in the New York Stock Exchange is property subject to the inheritance transfer tax prescribed by a law of the state which defined the words "estate" and "property," as used in the law, as including "*all property or interest* therein situated within or without the state." Further cases to the same effect are: *Odell v. Boyden*, 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239; *In re Currie*, 185 Fed. 263, 107 C. C. A. 369; *Nashua Savings Bank v. Abbott*, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. 430. That such a membership is a species of property is recognized by decisions of this court. *State v. Chamber of Commerce of Minneapolis*, 77 Minn. 308, 79 N. W. 1026; *Evans v. Chamber of Commerce of Minneapolis*, 86 Minn. 448, 91 N. W. 8; *McCarthy Bros. Co. v. Chamber of Commerce of Minneapolis*, 105 Minn. 497, 117 N. W. 923, 21 L.R.A.(N.S.) 589.

Defendant points to the definitions of the word "property" in the dictionaries, law dictionaries, and decided cases, and insists that the right to alienate or transfer is an essential incident to property. As has been shown, there is a right to transfer a Board of ✓ Trade membership, though such right is subject to the right of the board to disapprove the sale. It is true that the right to dispose of the membership, as well as the right of the member to retain it and use it, is subject to the rules of the board, as expressed in *Evans v. Chamber of Commerce*, *supra*, "clogged with conditions." But that the membership is still "property" we think is true. Whether it is property that is taxable under the laws of the state, is another question and will be treated separately. Defendant calls a membership in the Board of Trade a mere personal privilege, and compares it to a membership in a social club or church. The distinction is we think obvious. And the same is true of the reputation of a lawyer, physician or banker. All these things have a value to the owner, but there is nothing tangible that he may sell for a consideration, put up as collateral, or which may be reached by his creditors. But a membership and seat in a Chamber of Commerce, Board of Trade, or Stock Exchange, not only is often of great value, and may be alienated by the owner, but under the decisions

cited, may be reached by his creditors. It may be pledged as collateral, and passed by will or descent. As stated by the trial court and in some of the decisions, the fact that there are restrictions upon the ownership and transfer, bears more upon the question of value, than it does upon the question whether the membership is property.

2. And we think that such a membership is personal property of a character that is properly taxable. That is, that the legislature, under the provisions of the Constitution, has the power to tax property of this character. The Constitution of the state, at the time of the enactment of the laws hereinafter considered, provided that "laws shall be passed taxing \* \* \* *all real and personal property* according to its true value in money." That this provision granted the legislature the power to enact laws taxing such property as a membership in a board of trade or stock exchange is fairly clear from the consideration of the nature of such a membership, and the language of the Constitution. Indeed, not only was the power granted, but a duty to enact such laws was imposed.

3. The constitutional provisions are not however self-executing. It was necessary for the legislature to exercise the power given and to perform the duty imposed, by passing laws. The question then is whether our statutes providing for the taxation of property include and cover property of the character of a membership in a board of trade or chamber of commerce.

The provision requiring the legislature to pass laws taxing all real and personal property existed in the Constitution at the time of its adoption and until the amendment of 1906. While Minnesota was still a territory, it had a statute providing that all property, real and personal, not expressly exempted, should be subject to taxation. R. S. 1851, c. 12, § 1; Statutes 1849-1858, c. 9, § 1. In the revision of 1866, [p. 153, c. 11] it is declared that "all property, whether real or personal, in this state \* \* \* is subject to taxation." Substantially the same provision has continuously been in our statutes and is there at the present time. G. S. 1878, c. 11, § 1; G. S. 1894, § 1508; R. L. 1905, § 794; G. S. 1913, § 1969. Under section 794, R. L. 1905, which provides that "all real and personal property in this state, and all personal property of persons

residing therein, \* \* \* is taxable, except such as is by law exempt from taxation," there would be little if any difficulty in holding that a board of trade membership, being personal property of a character which might be made subject to taxation, and not exempted from taxation, was included in the words "all personal property." Were it not for section 797, it would be clear that the assessment and levy by the proper officers of a tax on such a membership would be justified.

Section 797 names 11 specific classes of personal property, in no one of which are by name included Board of Trade memberships. So far as here material, its language is as follows: "Personal Property \* \* \* shall be construed to include:

"1. All goods, chattels, moneys and effects." Then follow 10 other particular classes of property.

Section 835 provides that the assessor shall fix the value of items of personal property under 30 heads, the last of which is "The value of all other articles of personal property not included in the preceding items."

We think it should not be held that section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. "Shall be construed to include" does not necessarily mean "shall only include." The section was not intended to be restrictive, but rather to help define what was meant by "all personal property," as that term is used in section 794. This view is greatly strengthened by the unquestioned fact that it is the settled policy of the state, as expressed in its Constitution, statutes, and decisions, that all property within the state shall be taxed, unless exempt. *Board of Co. Commrs. of Rice County v. Citizens' Nat. Bank of Faribault*, 23 Minn. 280, 286; *State v. Jones*, 24 Minn. 251; *County of Olmsted v. Barber*, 31 Minn. 256, 17 N. W. 473, 944; *In re Jefferson*, 35 Minn. 215, 219, 28 N. W. 256; *State v. Stearns*, 72 Minn. 200, 222, 75 N. W. 210. In the *Rice County* case, decided in 1877, in referring to section 1, c. 1, p. 1, Laws 1874, which provides that "all real property in this state, and all personal property of persons residing therein \* \* \* is subject to taxation" the court said: "The evident purpose of this

section was to declare, in general terms, that all property, both real and personal, within the jurisdiction of the state, unless specially exempted, should be subject to taxation." In *State v. Jones*, where it was decided that a certain debt was property and subject to taxation, Chief Justice Gilfillan said: "This debt was property, and it was the intention both of the Constitution and statute that all property, unless expressly exempted, should be taxed." At the time these and the other decisions were rendered, there were in force statutory provisions similar to section 797, Laws 1874, p. 1, c. 1, § 3, provided that "personal property shall, for the purposes of taxation, be construed to include" certain described classes of property, and the same provision was contained in chapter 1, section 3, Laws 1878, in chapter 11, § 3, G. S. 1878, and in section 1510, G. S. 1894. In no case has it been considered that these provisions amounted to a declaration that no property was to be taxed that was not covered by the classes. It would have been a breach on the part of the legislature of a duty imposed by the Constitution to omit from taxation property that was not exempt, and we certainly should not find such a breach unless the statute is fairly open to no other construction.

Section 835, before quoted, defines what the statement of the property owner shall contain. He is required to list, and the assessor to fix the value of, "all other articles of personal property not included in the preceding items." In *State v. Western Union Tel. Co.* 96 Minn. 13, 104 N. W. 567, this omnibus clause was said to be adequate for the taxation of the property of foreign corporations as a system. We are of the opinion that, when the legislature declared that all personal property should be taxed, all that follows in the succeeding sections by the way of classifying property, defining how it shall be listed, assessed and taxed, is for the purpose of making it easier for the assessing officers to do their work, and attempting to advise the property owner as to his duties. The following language from Justice Jaggard's opinion in the *Western Union* case is pertinent at this point: "It is true that the taxing authorities of this state have failed to avail themselves of this means for properly increasing public revenue; but a privilege of exemption is not, therefore, to be based upon such official dereliction. It is an obvious rule

that a revenue statute should be construed upon the assumption that a legislature would make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without making provision for the collection of taxes on all other property equally subject to taxation."

We hold that section 797 was not intended to contain a statement of all personal property subject to taxation, and that the fact that board of trade memberships do not come under any of the 11 classes, does not mean that they are not to be taxed.

It is confidently asserted by defendant that the authorities in other states are uniform, to the effect that a seat or membership in a board of trade or stock exchange cannot be taxed. This is not quite true, as we shall point out, but it is not to be denied that in every case that has arisen in this country directly involving the question, the membership has escaped taxation. *Mayor, etc. of Baltimore v. Johnson*, 96 Md. 737, 54 Atl. 646, 61 L.R.A. 568; *Thompson v. Adams*, 93 Pa. St. 55; *City & County of San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034, 42 Am. St. 98; *People v. Feitner*, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. 698. In the Maryland case, it does not appear that there was a statute declaring that all personal property was subject to taxation. The court recognized that a membership in the Baltimore Stock Exchange was in a certain sense property, but held that the legislature had not expressed an intention to tax such property, and had made no provisions as to *how* such property should be taxed. The Pennsylvania and California cases proceed on the ground that such a membership is not property, but a mere personal privilege. This ground is unsound, as we have already held in this opinion. The New York case, *People v. Feitner*, held that an exchange membership was property, but was not taxable because the legislature had not enacted a statute that covered such property. The New York statute is quite similar to ours, and the decision would be good authority but for the subsequent case of *In the Matter of Hellman*, 174 N. Y. 254, 66 N. E. 809, 95 Am. St. 582. The Hellman case, while not overruling *People v. Feitner*, seems to us inconsistent with that decision. Under a statute prescribing an inheritance or "transfer" tax it was provided that a certain tax should

be imposed on the transfer of *any real or personal property* by will or descent. By a section of the act, the words "estate" and "property" as used in the law, were defined as including "all property or interest therein, whether situated within or without this state." It was held that a seat in the New York Stock Exchange was property, and subject to the tax. Referring to *People v. Feitner*, the court said: "We did not question this proposition," (that such a seat was property) "but our decision proceeded on the ground that the seat did not fall within what Judge Vann termed 'the somewhat restricted definition of the tax laws.'" We are unable to see any real distinction between an inheritance tax imposed upon "all property" and the provision of our statute that "all property" is subject to taxation. The *Hellman Case* and the statement of Justice Lurton in *O'Dell v. Boyden*, 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239, that such a membership is "descendible, taxable and assignable," constitute our reason for saying that the statement that the authorities are unanimous against the taxation of such a membership, is not quite true.

As to the cases cited holding that an associated press franchise, a bank franchise, good will of a newspaper, ground rent under a lease, were not taxable under the various statutes of the states in which the decisions were made, it is sufficient to say that they are not particularly in point. In the case of *State v. Western Union Tel. Co.*, this court took a position that seems to render these cases out of line with the law in this state.

4. We attach little weight to the argument of practical construction. The evidence shows no such settled construction of the statute as to warrant us in applying the doctrine here.

5. We do not sustain the claims that the taxation of memberships in a Board of Trade or Stock Exchange, would violate provisions of the Federal or state Constitution. It is argued that such taxation would be class legislation and violate the equality clause in the Minnesota Constitution, because the privileges enjoyed by members of social clubs, commercial clubs, golf clubs, secret and church societies, are not subject to taxation. We see no improper classification here, nor any lack of equality or uniformity. Nor would it be double

taxation. The members of the board are not required to pay taxes on the physical and tangible property of the board, nor does the board pay taxes upon the intangible rights which constitute the value of a membership.

And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal Constitution and amendments.

Our conclusion, after a careful consideration of the arguments and briefs in this case and in the case of *Rogers v. County of Hennepin*, infra, page 539, 145 N. W. 112, is that the trial court properly rendered judgment against defendant for the tax assessed against his membership in the Duluth Board of Trade.

Order affirmed.

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### STATE v. HENRY E. BRAND.<sup>1</sup>

January 23, 1914.

Nos. 18,526—(300).

#### **Illegal sale of liquor.**

Defendant was convicted of selling liquor to a public prostitute. *held:*

- (1) That, to establish that the woman was a public prostitute, evidence is admissible that such is her general reputation.
- (2) That the woman to whom the liquor was furnished was not an accomplice of the person selling the same.
- (3) That improper remarks of the county attorney were not prejudicial error under the facts of this case.

Defendant was indicted for the crime of selling liquor to a public prostitute, tried in the district court for the county of Blue Earth

<sup>1</sup> Reported in 145 N. W. 39.

before Pfau, J., and a jury, and convicted. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

*W. A. Plymat and S. B. Wilson*, for appellant.

*Lyndon A. Smith*, Attorney General, and *John W. Schmitt*, County Attorney, for respondent.

**TAYLOR, C.**

Defendant was convicted of selling liquor to a public prostitute. He made a motion for a new trial and appealed from the order denying this motion.

1. The prosecution was permitted to support the charge that the woman to whom the liquor was furnished was a public prostitute by testimony that such was her general reputation. Defendant insists that the admission of such evidence was error. We cannot sustain this contention. When it is necessary to establish the character of a person as to chastity or unchastity, evidence of the reputation of such person in that respect is proper. 2 Wigmore, Evidence, § 1620; 3 Enc. of Ev. 56; 16 Cyc. 1275; 5 Am. & Eng. Enc. (2d Ed.) 851, 874, 878; *State v. Smith*, 29 Minn. 193, 12 N. W. 524; *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. 656; *State v. Bresland*, 59 Minn. 281, 61 N. W. 450; *Egan v. Gordon*, 65 Minn. 505, 68 N. W. 103; *State v. Hoyle*, 98 Minn. 254, 107 N. W. 1130; *State v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. St. 666; *Howard v. People*, 27 Colo. 396, 61 Pac. 595; *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132; *Boddie v. State*, 52 Ala. 395; *Commonwealth v. Harris*, 131 Mass. 336.

2. The evidence that the woman was furnished intoxicating liquor by defendant was ample.

Conceding that the detective made himself an accomplice by purchasing liquor for her, yet his testimony was amply corroborated. If his testimony be entirely rejected, the testimony of the woman herself as to this point was sufficient to sustain the verdict. And she was not an accomplice. *State v. Baden*, 37 Minn. 212, 34 N. W. 24; *State v. Quinlan*, 40 Minn. 55, 41 N. W. 299; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *State v. Sargent*, 71 Minn. 28,



73 N. W. 626; *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *State v. Renswick*, 85 Minn. 19, 88 N. W. 22.

3. In his argument to the jury, the county attorney characterized the defendant as a scoundrel and made other statements which went beyond the limits of legitimate argument. The court gave no express instruction to disregard these remarks. He stated in effect, however, that the jury were not to be governed by what counsel upon one side or the other asserted had or had not been proven; but were to determine the facts from the evidence presented before them, and not from the remarks of counsel. This conduct of the county attorney presents the most serious question in the case. No objection was made or exception taken, however, until after the argument had been concluded. Defendant then enumerated 12 statements of the county attorney to which he took exception, and presented an omnibus request to charge the jury to disregard the remarks to which exceptions had been taken. This request was properly refused for the reason that it was too broad. Some of the remarks were justified by the evidence, and the giving of the request would have directed the jury to exclude from consideration matter which was proper as well as matter which was improper.

In *State v. Nelson*, 91 Minn. 143, 97 N. W. 652, it is said: "New trials should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. \* \* \* If there be no doubt of his guilt, alleged errors not affecting his substantial or constitutional rights should be brushed aside." The rule announced in this case has been affirmed repeatedly and technical errors which could not reasonably have affected the result are disregarded. *State v. Crawford*, 96 Minn. 95, 104 N. W. 768, 822, 1 L.R.A.(N.S.) 839; *State v. Gardner*, 96 Minn. 318, 104 N. W. 971, 2 L.R.A.(N.S.) 49; *State v. Williams*, 96 Minn. 351, 105 N. W. 265; *State v. Schueller*, 120 Minn. 26, 138 N. W. 937; *State v. Rusk*, 123 Minn. 276, 143 N. W. 782. Whether unwarranted remarks by the county attorney are prejudicial, when viewed in the light of the circumstances attending their use, must be left to some extent to the judicial discernment of the trial judge. It is said in *State v. Adamson*, 43 Minn. 196, 45 N. W. 152,

where language improperly reflecting upon the defendant had been used, that "we deem the refusal of the court to grant a new trial for the cause alleged to have been not an abuse of legal discretion." In *State v. Nelson*, 91 Minn. 143, 97 N. W. 652, the failure of the trial court to attach importance to certain improper remarks was deemed persuasive that they were not prejudicial.

In the case at bar there is no doubt as to defendant's guilt. He offered no evidence and the evidence presented by the state was ample. How the improper language could have affected the result is not apparent, and, the trial court having deemed such language not of sufficient importance to disturb the verdict, we hold that, under the facts of this case, it was not prejudicial error.

Order affirmed.

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MAYER GREENBERG v. C. E. VAN DUZEE.<sup>1</sup>

January 30, 1914.

Nos. 18,310—(204).

**Action upon note — question for jury.**

1. In an action on a promissory note guaranteed by one of the defendants, it is *held* that the only question for submission to the jury was whether the defendant knew that one of the makers had been or was to be released from liability upon it; and that the evidence justifies the jury's finding that he did.

**Same.**

2. There were no errors affecting the issue submitted to the jury.

Action in the district court for Hennepin county against K. Copilovitch and C. E. Van Duzee to recover \$1,000 upon a promissory note. The facts are stated in the opinion. The case was tried before Hale, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying his motion for a new trial, defendant Van Duzee appealed. Affirmed.

<sup>1</sup> Reported in 145 N. W. 124.

*Trafford N. Jayne*, for appellant.

*Gustavus Loevinger* and *Louis L. Schwartz*, for respondent.

DIBELL, C.

Action on a promissory note against Copilovitch as maker and Van Duzee as guarantor. Verdict for the plaintiff against both. Van Duzee appeals. Copilovitch answered but does not appeal.

1. In July, 1910, the defendant Copilovitch and one Herman Greenberg, a son of the plaintiff, bought a moving picture show of a partnership of which the defendant Van Duzee was a member, for \$1,500, paying \$500 in cash, and giving their note for \$1,000 due in a few days. They borrowed \$1,000 from the plaintiff to pay this note, giving him a note and chattel mortgage. In January, 1911, they were in default and the mortgage was subject to foreclosure. Copilovitch purchased the interest of Herman Greenberg, and the plaintiff released the latter from liability on the note, and extended the time of payment to January 1, 1912. Van Duzee guaranteed the payment of any amount which should remain unpaid on the note on January 1, 1912.

The court submitted to the jury, as the only issue in the case, whether Van Duzee knew that Herman Greenberg had been or was to be released, charging that if he did he was liable, and that otherwise was not. The evidence made no other issue. It did not sustain a charge of fraud. The defendant complains of the guarantee only because of a lack of consideration. There was a consideration as a matter of law and the court properly so charged.

The jury found that Van Duzee knew of the release of Herman Greenberg. The evidence was in dispute but sufficient to justify the finding.

2. Errors are claimed in rulings on evidence. An examination shows that all rulings, as to which errors can properly be suggested, were directed to issues which were properly taken from the jury, such as the charges of fraud and the claim as to consideration, or bore upon the liability of Copilovitch which was dependent upon different considerations than that of Van Duzee. We find no errors in rulings on evidence bearing upon the one issue submitted to the jury. The

questions raised are not of such value as to justify a discussion at length.

Order affirmed.

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MARY A. POTTS v. MINNEAPOLIS, ST. PAUL & SAULT  
STE. MARIE RAILWAY COMPANY.<sup>1</sup>

January 30, 1914.

Nos. 18,312—(198).

**Ejectment — eminent domain — excessive damages.**

In an action in ejectment, by the answer of defendant turned into a condemnation proceeding under sections 5423, 5424, G. S. 1913, it is *held* that the award of damages is excessive, and that a new trial should be granted unless plaintiff consents to a reduction of the verdict.

Action in the district court of Mille Lacs county. The facts are stated in the opinion. The case was tried before Nye, J., who at the close of the testimony denied defendant's motion that the court instruct the jury to return a verdict for nominal damages in favor of plaintiff, and a jury which returned a general verdict for \$6,500 in favor of plaintiff and rendered a special verdict that the total rental value of the premises occupied by the dock was \$600; that the value of the dock site itself as a permanent acquisition was \$5,000, and the damages sustained by plaintiff as to that part of block 1 as to which the court instructed title was in the plaintiff was \$500. Defendant's motion for judgment in favor of plaintiff and against defendant for nominal damages only as to each of the several pieces of property involved in the action, notwithstanding the verdict, or for a new trial, was denied on condition that plaintiff consent to a reduction of the verdict to \$5,040. From the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial,

<sup>1</sup> Reported in 145 N. W. 161.

it appealed. Affirmed on condition that plaintiff consent to a reduction of the verdict to \$3,500.

*John L. Erdall and Fryberger, Fulton & Spear, for appellant.*  
*Rollo N. Chaffee and Ernest C. Carman, for respondent.*

BROWN, C. J.

Defendant's line of railroad extends near the shore of Mille Lacs lake and through the platted townsite of Potts Town, located near the station of Waukon, in Mille Lacs county. After the construction of the main line defendant, without first having acquired the right so to do, constructed a spur track to the lake shore, and appropriated a tract of land belonging to plaintiff about 50 feet wide and 110 feet long, extending from the shore into the lake to the point of navigation, which was made into a dock suitable for the transfer of freight from cars to lake boats, and from the latter to cars for shipment. Thereafter plaintiff brought this action in ejectment to recover possession of the land so taken, and by the answer defendant turned the action into one for the condemnation of the land, under sections 5423, 5424, G. S. 1913. So that the trial below presented the single issue of the amount of plaintiff's damage. The jury returned a verdict for \$6,500. On a motion for a new trial on the ground of excessive damages, the trial court, because of the fact that some of the items of damage claimed were not sustained by sufficient evidence, as a condition to denying a new trial, ordered the verdict reduced to \$5,040, which reduction was accepted by plaintiff, and a new trial was denied. Defendant appealed.

The assignments of error present two questions, namely: (1) Whether the trial court erred in its rulings upon the competency of certain witnesses called by plaintiff upon the question of the value of the land, and (2) whether the verdict as reduced is still an excessive award of damages. We pass the first point with the remark that the question of the competency of witnesses in cases of this kind rests largely in the discretion of the trial court, in the exercise of which we discover no error.

2. The second question is substantial, and has received careful consideration. We have examined the record fully and reach the con-

clusion that the verdict, even as reduced, is entirely out of proportion to what is fair and just. The tract of land taken by defendant is quite small, and extends from the lake shore to the point of navigation in the lake. The land itself is of course of little value, its value consisting chiefly in its location and adaptability for a particular use, namely, as a dock to be used in connection with lake traffic. The land taken does not occupy all the space in the tract available for this purpose, and plaintiff is not wholly, or even substantially, deprived of the right to construct another dock connecting with the same point of navigation, nor in any way deprived of the right of access to the lake. The shipments of freight over the lake are not large, and the evidence fails to show that prospects in this respect are particularly bright for the future. Prior to the advent of the railroad the land in question together with the wharfage rights were undoubtedly of inconsiderable value, and they became of special value only by its appearance in the locality. And though the railroad company in such cases must expect to pay the enhanced value of land taken, the same being brought about by the construction of its line of road, there is such a thing as overreaching the point of fairness, and imposing upon the company the payment of fanciful rather than real values. In this case we conclude, from the evidence, that the point of fairness was exceeded by the verdict, even as reduced, and that there should be a further reduction as a condition to a denial of a new trial. The case is wholly unlike an action for personal injuries, where this court interferes with the amount of the verdict only in exceptional cases. In such actions there necessarily is often much uncertainty respecting the nature and character of the injury complained of, and the suffering endured by the injured party, and we as a rule leave the matter of damages to the jury and trial court. But in a case like that at bar, there is no difficulty in ascertaining the value of the land, and the relative injury to the complaining party. While to an extent the damages are more or less speculative, they may be measured with a degree of approximate certainty, and the reason for giving special weight to the opinion of the trial judge and jury in the other class of cases does not apply.

It is therefore ordered that the order appealed from be reversed

and a new trial granted unless the plaintiff shall within 10 days after the cause is remanded consent to a reduction of the verdict to the sum of \$3,500. If so reduced the order appealed from will be and it is affirmed.

It is so ordered.

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CARLOS J. KINZEL v. BOSTON & DULUTH FARM LAND  
COMPANY.<sup>1</sup>

January 30, 1914.

Nos. 18,318—(208).

**Action for value of services — pleading and proof.**

1. Where a complaint, in an action for compensation for services rendered, alleges the reasonable value thereof, and also that defendant agreed to pay a certain sum therefor, and there is no election at the trial upon which theory, *quantum meruit* or express contract, plaintiff will proceed with the trial and both issues are retained in the case, plaintiff is at liberty to prove either the agreed or reasonable value, and recover a verdict accordingly.

**Judgment bar to second action.**

2. Where, in such a case, a general verdict is returned for defendant, a judgment rendered thereon is *res judicata*, and constitutes a complete bar to a subsequent action for the reasonable value of the services, even though no evidence thereof was presented on the trial of the first action.

**Former judgment concludes the parties.**

3. The rule applicable to the situation is that the former judgment concludes the parties as to all issues that were or could have been litigated therein.

**Same — case distinguished.**

4. The primary question of plaintiff's employment was necessarily litigated in the former action, for it was expressly in issue therein, and for this reason *Rossman v. Tillyen*, 80 Minn. 160, is distinguishable.

<sup>1</sup> Reported in 145 N. W. 124.

Action in the district court for St. Louis county to recover \$5,000 for services as a real estate broker rendered defendant in making a sale of land. The answer alleged as a bar to the action a former action between the same parties upon the identical cause of action. The case was tried before Dibell, J., who granted defendant's motion for judgment on the pleadings. From an order denying plaintiff's motion for a new trial, Fesler, J., he appealed. Affirmed.

*J. W. Reynolds*, for appellant.

*Washburn, Bailey & Mitchell*, for respondent.

BROWN, C. J.

Plaintiff brought this action to recover the reasonable value of services rendered by him as agent of defendant in procuring a purchaser for land owned by defendant, and which plaintiff was authorized by his employment to sell. The court ordered judgment for defendant on the pleadings and plaintiff appealed from an order denying a new trial.

The only question presented on this appeal is whether the action is barred by a judgment in a former suit between the same parties, the facts in respect to which are as follows:

In the former action, concerning which there is no controversy, the complaint alleged the performance of the services, "at the special instance and request of the defendant," the same being identical with the services for which recovery is here sought, and that they were of "the fair, reasonable and agreed value of \$5,952.10." Defendant's answer was a general denial, and upon the issues thus framed the cause was brought to trial. At the opening of the trial counsel for defendant moved the court for an order requiring plaintiff to elect whether "he will proceed upon *quantum meruit*, or upon contract, and that he be required to amend his complaint accordingly." The motion was denied, and defendant excepted to the ruling. Counsel for defendant then requested counsel for plaintiff "to state upon what theory he is proposing to proceed, whether upon *quantum meruit*, or upon an express contract." Counsel replied that he had no statement to make, that the cause of action was stated in the complaint, as the "fair, reasonable and agreed value," and upon those



allegations he relied. Counsel for defendant then moved the court that plaintiff be required to proceed upon the theory of an express contract, and, upon the motion being denied, moved that plaintiff be required to proceed upon the implied contract, which motion the court also denied. The cause then proceeded to trial and from the charge of the court to the jury, which is incorporated in this record, it appears that the evidence offered by plaintiff tended to show an express contract by which he was employed or authorized to effect a sale of the land, or procure a purchaser therefor, and that he was to receive a stated compensation for his services. The evidence offered by defendant directly contradicted that of plaintiff and tended to show that there was no contract relation between plaintiff and defendant at all, in respect to the land in question, and that defendant neither employed nor authorized plaintiff to sell the land or to procure a purchaser therefor. The jury returned a general verdict for defendant, upon which judgment was subsequently rendered to the effect that plaintiff take nothing by the action. Thereafter, through a new counsel, one not engaged in the former action, plaintiff brought this action to recover the reasonable value of his services, alleging, as in the former action, that at the "special instance and request of the defendant" he performed certain services in and about the sale of land, of the reasonable value of \$5,000.

There is some confusion in the authorities upon the subject of *res judicata*, and in respect to when and under what circumstances a judgment in an action becomes final and conclusive upon the parties in subsequent litigation. In some of the states it is held, where either the rule estoppel by judgment or estoppel by verdict is invoked, that the party invoking it must affirmatively show that the precise issue or question was actually litigated and decided in the former suit. This is particularly true where the pleadings tender several issues, and the courts referred to hold that a judgment in such a case, under a general verdict, does not necessarily conclude a subsequent action involving any of the issues so presented. 1 Van Fleet, Former Adjudication, 618. While other courts hold to the rule that, *prima facie*, the parties are concluded upon all the issues so presented. *Rhoads v. City of Metropolis*, 144 Ill. 580, 33 N. E. 1092, 36 Am.

St. 468; Sheldon v. Edwards, 35 N. Y. 279. Yet the presumption is not conclusive. Bottorff v. Wise, 53 Ind. 32; Hahn v. Miller, 68 Iowa, 745, 28 N. W. 51. But whatever may be the trend of the authorities elsewhere, the rule is well settled in this state, and under our decisions all issues which were in fact or which were necessarily involved and could have been litigated are concluded by the former suit. The rule is clearly expressed by Chief Justice Start, in Veline v. Dahlquist, 64 Minn. 119, 66 N. W. 141, in the following language: "A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein." The rule thus stated was followed and applied in White v. Hewitt, 119 Minn. 340, 138 N. W. 421, where a former judgment was held *res judicata* though the issue presented was not actually litigated in the former suit. See also O'Brien v. Manwaring, 79 Minn. 86, 81 N. W. 746, 79 Am. St. 426; Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107. The rule stated may be subject to some exceptions, as for instance it might be shown that a particular issue or question was not in fact litigated by reason of its express withdrawal before the trial or final submission of the case (Estes v. Farnham, 11 Minn. 312 [423]), or, in a case involving several causes of action, that one of them was dismissed or expressly abandoned before trial. In this case the complaint stated two causes of action, at least presented two separate grounds for the measurement of plaintiff's recovery, namely, *quantum meruit*, and the alleged agreed compensation. Plaintiff insisted at the trial that neither issue be eliminated, and the court sustained him, holding that plaintiff need not elect upon which theory of the case he would proceed to trial. In this situation, within the rule stated in the Veline and White cases, it is immaterial that the issue of reasonable value was not in fact litigated. It could have been litigated, was not withdrawn or expressly abandoned, on the contrary was retained as an issue in the case upon the insistence of plaintiff. The two causes of action were not inconsistent and were properly joined in the complaint, though correct practice required their separate statement. And, though mingled in one statement, it was within

the discretion of the court to order an election at the trial. *Plummer v. Mold*, 22 Minn. 15; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308. No election having been ordered, plaintiff could have offered, in addition to showing the contract of employment, evidence of the agreed compensation or the value of the services rendered, and recovered upon either ground. *Burbridge v. Kansas City Cable R. Co.* 36 Mo. App. 669; *Ware v. Reese*, 59 Ga. 588. Plaintiff cannot avoid the effect of the estoppel by showing that no evidence was offered as to one of the issues thus presented, and which was retained in the case at his instance. *Swank v. St. Paul City Ry. Co.* 61 Minn. 423, 63 N. W. 1088; *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. 444; *Herman v. Allen*, 103 Tex. 382, 128 S. W. 115. Many of the authorities cited by plaintiff in support of the present action are based upon the general rule that if a second suit be upon a different cause of action, a former judgment is not a bar though involving the same subject-matter. The proposition is elementary, but does not here apply, for the reason that the identical cause of action here sought to be prosecuted to judgment was pleaded and was an issue in the former action, and since it was not there expressly abandoned, the judgment therein rendered is conclusive. And, moreover, the primary issue in the former, as well as in the present action, was whether any contract relations ever existed between these parties in respect to a sale of the land; in other words, whether plaintiff, "at the special instance and request of the defendant," made a sale of the land. This allegation of the complaint in the former action was expressly denied and put in issue. It was necessarily litigated on that trial, for it lay at the threshold of plaintiff's case. The same issue is presented in the second action, and it might well be contended that as to that issue the doctrine of estoppel by verdict applies, including the second litigation thereof. *Toomy v. Hale*, 100 Cal. 172, 34 Pac. 644. For this reason the case of *Rossman v. Tilleney*, 80 Minn. 160, 83 N. W. 42, 81 Am. St. 247, is not in point. There was no issue in that case as to the existence of a contract of employment, and the sole question was whether plaintiff had performed the contract and was entitled to an agreed compensation or the value of his work.

Order affirmed.

**EDWIN STEVENS and Another v. WISCONSIN FARM LAND COMPANY and Others.<sup>1</sup>**

January 30, 1914.

Nos. 18,339—(209).

**Broker — action for services — evidence of value.**

1. In an action by an agent to recover the reasonable value of services rendered in effecting an exchange of property, evidence of the value of the property received by the principal is proper.

**Custom — evidence of customary charge.**

2. Evidence of customary charge of brokers in similar cases is proper, but in order that a customary charge may be decisive of the amount of recovery, a custom must be established so definite, uniform, and well understood that it may be assumed the parties contracted with reference to it, and in effect made it a part of their contract.

**Undisclosed principal — plaintiff can elect to hold principal or agent, not both.**

3. If an agent contracts in his own name without disclosing his principal, the other contracting party is entitled to hold either, but not both. If he sue both, however, the only remedy of defendants is by motion to compel him to elect. They cannot move a dismissal as to either. The option as to which shall be held rests with plaintiff, not with defendants.

**Excessive damages — new trial — option to accept reduction of verdict.**

4. Where error in the case bears only on the question of the amount of damages, a new trial may be granted upon that issue alone. Where defendant's testimony admits a certain amount, plaintiff may be given the option of accepting that amount in preference to taking a new trial.

<sup>1</sup> Reported in 145 N. W. 173.

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Note.—On the question of the right to join agent and undisclosed principal as defendants in same action, see note in 26 L.R.A.(N.S.) 742. And for action against agent as bar to one against principal undisclosed when first action begun, see note in 6 L.R.A.(N.S.) 729. And as to commencing action or taking judgment against either an undisclosed principal or his agent as a bar to a subsequent action against the other, see note in 21 L.R.A.(N.S.) 786.

Action in the district court for Ramsey county to recover \$15,000 for services as real estate brokers in effecting an exchange of property belonging to defendants. The facts are stated in the opinion. The case was tried before Catlin, J., who at the close of plaintiff's testimony dismissed the action as to the Boynton & Holway Land Co. and denied a motion to dismiss as to the other defendants other than the Wisconsin Farm Land Co., and denied defendants' separate motions for directed verdicts as to defendants Boynton and Holway individually and Boynton & Holway as a partnership, and a jury which returned a verdict for \$8,000 in favor of plaintiff. From an order denying their motion for a new trial, defendants appealed. New trial granted on the question of damages only, unless plaintiffs consent to a reduction of the verdict to \$5,000.

*Briggs, Thygeson & Everall and Homer C. Clark*, for appellants.  
*W. E. Barnacle*, for respondents.

HALLAM, J.

Defendant Wisconsin Farm Land Co. exchanged certain land in Wisconsin for the Aberdeen hotel in St. Paul. Plaintiffs claim that they were employed by defendants Boynton and Holway to make this exchange, and that they procured it to be made. They sue for the reasonable value of their services. Defendants concede their right to compensation, but claim a special agreement by which it was agreed that plaintiffs should receive for their services a percentage of the proceeds of the Aberdeen hotel when it should be resold. The jury found against this contention and returned a verdict in favor of the plaintiffs, fixing the value of their services at \$8,000.

1. At the trial defendants sought to prove the value of the Aberdeen hotel property, as well as its size, character and general condition. Objections to such evidence were sustained. The court ruled that the value of the property taken in exchange was not a factor to be considered in determining the value of plaintiffs' services, and on this theory submitted the case to the jury.

The rulings of the court were erroneous. The question at issue was the reasonable value of the services of brokers in effecting an exchange of property. Any evidence which would throw light on the

value of the services was admissible. The time spent, the money expended, the amount involved, the results achieved, and customary charges for similar services, were all proper elements to be considered. *Mechem, Agency*, § 606; *Clark & Skiles, Agency*, § 353; *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. ed. 586. In determining the value of the services of an agent, we cannot wholly ignore the benefit of those services to the principal. This is perhaps the most important of the several elements of value. The authorities sustain this position.

In *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. ed. 586, an action to recover the value of services rendered by an attorney at law in effecting a sale of lands and in various legal proceedings concerning the title thereto, it was held that evidence as to the character of the land sold and its possible value as a suburb of a city was proper. The most important part of the service was that rendered in negotiations, and it was said that "the compensation to be made in such cases is, by the ordinary judgment of business men, measured by the results obtained."

On similar principles it is generally held that, in computing the value of an attorney's services, the importance of the case to the client, the result achieved, and the value of the services to the client, may be considered. *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58, 21 L.R.A. 418, 40 Am. St. 349.

2. The theory on which the trial court tried the case was that the reasonable value of plaintiffs' services is to be determined solely by a consideration of the amount usually and customarily paid to and received by other real estate brokers in the same locality for like services. Evidence of customary charges of brokers in similar cases is properly received. Ordinarily such evidence is simply an aid to the jury in arriving at the reasonable value of the services. *Baker v. Barker*, 118 Minn. 419, 137 N. W. 7; *Ruckman v. Bergholz*, 38 N. J. L. 531; *Hess v. Hayes*, 146 Iowa, 620, 125 N. W. 671. It is true the existence of a custom may be decisive of the amount to be paid. If there exist a business custom, definite, uniform, well-established and understood by the parties, and, if it is reasonable and lawful and not in contradiction of the express terms of the contract,

it may be assumed that the parties contracted with reference to it, and in effect made it a part of their contract. *Potts v. Aechteracht*, 93 Pa. St. 138; *Kock v. Emmerling*, 22 How. (U. S.) 69, 16 L. ed. 292; *Hollis v. Weston*, 156 Mass. 357, 31 N. E. 483; *Walls v. Bailey*, 49 N. Y. 464, 469, 10 Am. Rep. 407; *Walker v. Barron*, 6 Minn. 353 (508); *St. Anthony Falls W. P. Co. v. Eastman*, 20 Minn. 249 (277); *Paine v. Smith*, 33 Minn. 495, 24 N. W. 305; *Clarke v. Hall & D. L. Co.* 41 Minn. 105, 42 N. W. 785. The trouble is there is no evidence in this case of any definite or uniform custom establishing compensation of brokers upon exchange of properties. Plaintiffs' witnesses gave evidence of value, but it was not based on custom, but on the reasonableness of the charge. Their evidence was that commissions were paid ranging from thirty cents to five dollars per acre. Some of them said the size of the tract and the value of the land makes some difference. Plaintiff Lightbody based his testimony as to value on the circumstances of this case, including the result accomplished. Some of defendants' witnesses fixed the value at a lump sum. Others fixed it on a basis of varying sums per acre. Others fixed it on a basis of percentage of the actual value of the land. Most of them testified that the value of the property received in exchange affects the amount of the agent's charge. Clearly no custom was established by the witnesses on either side which in any sense entered into the contract of the parties.

3. Defendants contend that the evidence does not sustain a verdict against both the Land Co. and Boynton and Holway, on the ground that the Land Co. was the principal in the transaction and Boynton and Holway only its agents. The evidence on behalf of plaintiffs is that they contracted with Boynton and Holway, knowing nothing of the interest of the Land Co. If an agent contracts in his own name without disclosing his principal, the other contracting party, on discovering the facts, may hold either agent or principal. He is not entitled to hold both. If he sue both he may be compelled to elect between them. *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L.R.A.(N.S.) 742. This right to compel an election is defendants' only remedy. There was no request made at any stage of this case

that plaintiffs be required to elect. Defendants moved for a directed verdict in favor of the defendants Boynton and Holway. The court properly denied this motion. It was not for the defendants to say which one of them plaintiff should pursue. The option was with plaintiff. The court could not dismiss the cause as to either. There is no error on this branch of the case. See *Dean v. Leonard*, 9 Minn. 176 (190); *Marsh v. Webber*, 13 Minn. 99 (109); *Hewitt v. Brown*, 21 Minn. 163.

4. The error in the case bears only upon the question of the amount of damages. The question of liability of defendants to pay a commission of some amount was fairly presented by the evidence and fairly submitted to the jury by the charge of the court. We see no reason for a new trial upon this issue. We accordingly grant a new trial of the issue of the amount of damages only. This practice is well recognized. *Sauer v. Traeger*, 56 Minn. 364, 57 N. W. 933; *McKay v. N. E. Dredging Co.* 92 Me. 454, 43 Atl. 29; *Yaw v. Whitmore*, 66 App. Div. 317, 72 N. Y. Supp. 765; *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 23 S. E. 264, 30 L.R.A. 257, 53 Am. St. 611.

Inasmuch as the testimony on behalf of defendants admits a value of plaintiffs' services at \$5,000, we give the plaintiffs the option of accepting that amount, if they choose to do so, in preference to taking a new trial.

New trial granted, on the question of damages only, unless plaintiffs shall, within 20 days after remittitur, file with the clerk of the district court a written consent to a reduction of the verdict to \$5,000. In such case the judgment may be entered for such amount, with interest.



**C. W. RAYMOND COMPANY v. SAM KAHN.<sup>1</sup>**

January 30, 1914.

Nos. 18,341—(202).

**Conditional sale — replevin — action for unpaid instalments of price.**

1. In a so-called conditional sale contract, by which the seller retains title to the property and the right to recover it on default of the buyer, when the seller exercises this right and retakes the property, he cannot thereafter maintain an action to recover unpaid instalments of the purchase price.

**Quaere.**

2. Whether partial payments made by the buyer are forfeited, in the absence of language to that effect in the contract, when the seller recovers the property, is not decided.

**Replevin — condition precedent — return of partial payments.**

3. It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property, that he return or tender to the buyer partial payments made or notes given for unpaid instalments.

**Same — answer — demand.**

4. Where, in an action of replevin, the answer demands the restoration of the property to defendant, a demand before suit is not necessary.

Action of replevin in the district court for Scott county to recover certain machinery. The case was tried before Morrison, J., who when plaintiff rested granted defendant's motion to dismiss the action. From an order denying plaintiff's motion for a new trial, it appealed. Reversed and new trial granted.

*Peck & Moriarty*, for appellant.

*F. C. Irwin*, for respondent.

<sup>1</sup> Reported in 145 N. W. 164.

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Note.—The question of the right of a conditional seller to replevin property without returning or offering to return purchase money is treated in a note in 38 L.R.A.(N.S.) 897.

As to the purchaser's right to recover back payments where seller retakes property, see notes in 32 L.R.A. 465 and 38 L.R.A.(N.S.) 891.

BUNN, J.

Action in replevin to recover possession of certain brick-making machinery. At the close of plaintiff's case the trial court granted a motion of defendant to dismiss the action, and afterwards denied a motion for a new trial. Plaintiff appealed.

The ultimate question here is whether or not the trial court was right in dismissing the action. The facts, as they appeared from the evidence and the admissions of the parties, are as follows:

On March 4, 1910, defendant ordered in writing of plaintiff a brick-making machine, dies and end cutting table, for which he agreed to pay \$850 and freight from the factory. Of this sum, \$200 was to be paid in cash with the order, \$150 in cash at the time of delivery, \$250 in three months from the date of shipment, and \$250 in six months from such date. The last two payments were to be evidenced by negotiable promissory notes made by defendant, and dated on the day of shipment. The order recited that it was agreed that all of the articles specified were to remain the property of plaintiff and subject to its order until paid for in full, and that the giving of notes, or any payments on account, should not divest plaintiff of the title to the property until the purchase price was paid in full. The order further provided that in default of payment as agreed, the plaintiff might take possession of and remove the property without legal process. Plaintiff accepted the order in writing. The machinery was delivered to defendant in April. He paid the \$200 cash with the order, and the \$150 cash at the time of delivery, and he gave the two notes for \$250 each called for by the contract, payable respectively three and six months from the date of the order. He failed to pay these notes when they became due or thereafter. And this action in replevin was brought in July, 1911, to recover possession of the machinery.

Defendant answered, claiming the right to possession, and damages for breach of warranty. The reply was a general denial. On the trial plaintiff proved the contract, the delivery of the machinery, the giving and nonpayment of the notes, which it was admitted were in the possession of plaintiff, and rested. The motion to dismiss was granted, on the ground that plaintiff was not entitled to recover the

possession of the machinery, because it had not returned or offered to return to defendant the cash payments he had made, or the two promissory notes.

Was it a condition precedent to plaintiff's right of recovery that it return or tender to defendant the cash payments made and the notes? The question is a new one in this state, and of considerable importance, in view of the great volume of business done under conditional sale contracts like the one here. The contract in this case clearly provided that the title to the property remained in the seller until the notes were paid, and as clearly gave the seller the right to take possession on the default of the purchaser. But it did not provide that the payments made should be forfeited.

1. It is thoroughly well settled in this state that, after retaking or recovering the property under a contract of this kind for a default of the buyer, the seller cannot thereafter maintain an action to recover a balance due on the purchase price, or on notes given therefor. The seller has the election (1) to reclaim the property; (2) to treat the sale as absolute and sue to recover the debt; (3) to bring an action to foreclose his lien. But the assertion of either right is the abandonment of the others. When the property is retaken by the seller no further rights exist under the contract against the purchaser. *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *C. Aultman & Co. v. Olson*, 43 Minn. 409, 45 N. W. 852; *Keystone Mnfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028; *Alden v. W. J. Dyer & Brother*, 92 Minn. 134, 99 N. W. 784; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808. It follows that plaintiff in the case at bar, having elected to retake the property, could not thereafter maintain an action on the notes given by defendant. These notes being negotiable, defendant would be entitled to have them delivered up and cancelled. Whether their delivery or tender to defendant is a condition precedent to plaintiff's maintaining an action to recover the property, is a different question which we will determine later.

2. The question whether the vendor on recovery of the property must account to the vendee for all or any part of the payments made is not necessarily involved in this appeal, but it may become involved

on the trial of this or some other action between the parties. We do not determine the question, but will refer to some of the authorities.

Mr. Tiffany, in his work on Sales, states that it is generally held that the seller need not, in an action against the buyer in replevin, refund partial payments made, and that, although the seller reclaims the goods, the buyer cannot recover for payments made. Tiffany, Sales, 140. It is stated in Cyc. that as a general rule the seller need not, in an action to recover the goods, allow for or refund partial payments, such payments being regarded as forfeited. 35 Cyc. 704. See, also, 6 Am. & Eng. Enc. (2d ed.) 438, where this is said to be the prevailing doctrine. The cases supporting this rule of absolute forfeiture are cited in the text-books referred to. But the authors recognize that other authorities hold that the partial payments may be recovered, while still others hold that the buyer, against the amount he has paid, should be charged with the reasonable value of the use of the property, and its depreciation in value. We do not decide that all partial payments made by the buyer are forfeited when the seller recovers the property. We do decide that, if not forfeited, the seller should be credited with whatever is determined to be the value of the buyer's use of the property, and the amount of its depreciation.

3. In either case it follows that the return or tender by the seller to the buyer of partial payments made, is not a condition precedent to the recovery of the property in an action of replevin. The title is in the seller, and the contract gives him a right to take possession of the goods on default of the buyer. When he does so, he does not, accurately speaking, rescind the contract. He acts under it. The contract is executory, rather a contract to sell than a sale. The rule requiring one who rescinds a contract to put the other party *in statu quo* should not apply. Otherwise, the buyer may have the use of the property for a long time, and it may greatly deteriorate in value, and still the seller, to exercise his undoubted right to retake it for a default of the buyer, must pay back all the payments he has received, as well as cancel the unpaid indebtedness of the buyer. This rule seems as harsh against the vendor, as the rule forfeiting all payments seems harsh against the vendee. The following cases among

others hold distinctly that the return or tender to the buyer of partial payments made, or of notes given, is not a condition precedent to maintaining an action in replevin. *Fleck v. Warner*, 25 Kan. 492; *Duke v. Shackelford*, 56 Miss. 552; *Tufts v. D'Arcambal*, 85 Mich. 185, 48 N. W. 497, 12 L.R.A. 446, 24 Am. St. 79; *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363; *National Cash Register Co. v. Ferguson*, 25 Misc. 363, 55 N. Y. Supp. 592; *Latham v. Summer*, 89 Ill. 233, 31 Am. Rep. 79.

There are cases to the contrary. *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. ed. 125, where it is said, in the course of the opinion, that "the court below properly held that they could not retake the cattle while they retained the notes." *Latham v. Davis* (C. C.) 44 Fed. 862, where it is said that the better rule is that in reclaiming the property the seller rescinds the contract of sale so far as it has been executed, and is therefore bound to restore to the buyer anything he may have received. It is not expressly held that such restoration is a condition precedent. *Ketchum v. Brennan*, 53 Miss. 597, which distinctly so holds, but was overruled in *Duke v. Shackelford*, supra. *Fairbanks v. Malloy*, 16 Ill. App. 278, which is not in line with *Latham v. Sumner*, supra. *Shafer v. Russell*, 28 Utah, 444, 79 Pac. 559, where it is simply stated that it is not correct that the buyer forfeits payments already made. *Deering Harvester Co. v. Donovan*, 82 Minn. 162, 84 N. W. 745, 83 Am. St. 417, is not at all in point.

We adopt what we conceive to be the better rule, fairer to both parties; that is, that the return by the vendor or offer to return partial payments is not a condition precedent to retaking the property, or to maintaining an action in replevin for that purpose. And we do not base this on the ground that such partial payments are forfeited. What the rights of the parties are in regard to the adjustment of the accounts between them, may be determined, if not in the replevin action, in some other proceeding. As to how these rights affect the final determination of the replevin action, if at all, we do not decide. We call attention to two cases bearing upon the question. *Commercial Publishing Co. v. Campbell Printing Press & Mnfg. Co.* 111 Ga. 388, 36 S. E. 756; *Thirlby v. Rainbow*, 93 Mich. 164, 53 N. W. 159.

As to the notes given for the unpaid instalments, it is clear under

our decisions, as already stated, that they should be returned to the buyer. But we think such return or offer to return is not a condition precedent to maintaining the replevin action. If defendant demanded it, the court could protect his rights fully by ordering plaintiff to return the notes before judgment.

4. It is claimed that the dismissal of the action can be sustained on the ground that there was no demand before suit for delivery of the property. But the answer demanded the return of the property to defendant. Under our decisions this showed that defendant would not have complied with a demand, and it was therefore unnecessary. *Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; 3 Dunnell, Minn. Dig. § 8409.

Our conclusion is that the trial court should have denied the motion to dismiss, and tried the case on the merits.

Order reversed and new trial granted.

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## JACOB RUDER v. NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY.<sup>1</sup>

January 30, 1914.

Nos. 18,342—(222).

### Receipt of letter by mail — presumption.

1. Where a letter is deposited in the mails, postage paid and properly addressed, there is a strong presumption that it reached its destination in due course of mail. Applying this presumption, the jury was justified in finding that a cashier's check testified as having been mailed to defendant in payment of an assessment, was received by it. The jury was also justified in believing that the check had been mailed.

<sup>1</sup> Reported in 145 N. W. 118.

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Note.—On the question of the effect of the adoption of by-laws by fraternal insurance order upon benefit certificates already issued, see note in 1 L.R.A. (N.S.) 1065.

**Answer to juror's question.**

2. The trial court did not err in answering a question asked by a juror.

**Change of by-law — case followed.**

3. *Rosenstein v. Court of Honor*, 122 Minn. 310, followed and applied to the effect that a by-law of defendant adopted after a benefit certificate was issued, and changing the limit of time for bringing an action on the certificate, is not binding upon the certificate-holder or his beneficiary. Laws 1907, c. 345, § 8, does not apply to benefit certificates issued before its enactment.

**Request of jury for transcript of testimony on former trial.**

4. It was not error to decline to permit the jury, on its request, to have a transcript of the testimony of a witness given on a former trial.

**Refusal to allow letter to go to jury room.**

5. It was not error to refuse to permit a letter in evidence to be taken into the jury room, the letter being read to the jury instead.

**Objections to question sustained.**

6. It was not prejudicial error to sustain objections to questions calling for declarations of the deceased to the effect that he intended not to pay assessments in the future.

Action in the district court for Ramsey county to recover \$1,000 upon defendant's certificate of insurance upon the life of plaintiff's father. The case was tried before Quinn, J., and a jury which returned a verdict for \$1,039 in favor of plaintiff. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

*Harvey E. Hall and William G. White*, for appellant.

*A. J. Hertz and James E. Markham*, for respondent.

BUNN, J.

Plaintiff was named as beneficiary in an insurance certificate issued by defendant in October, 1906, to his father, Mendel Ruder, a member of Zion Council of defendant order located in Minneapolis. Mendel Ruder died January 5, 1911, and plaintiff brought this action April 13, 1912, to recover on the certificate. The answer alleged that Mendel Ruder failed to pay an assessment for the month of July, 1910, and that thereby his benefit certificate became forfeited July 31, 1910. It made the further defense that the action

was not brought within one year after the death of the insured, as required by the by-laws of defendant. The reply was a general denial. The case was tried to a jury, and the result was a verdict for plaintiff. Defendant moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appealed from an order denying the motion.

The only issue submitted to the jury was whether Mendel Ruder paid the July assessment, the trial court instructing that if he did, plaintiff should recover, but if not, the verdict should be for defendant. The only evidence of payment was the testimony of plaintiff to the effect that some time in July, 1910, the insured, in the presence of plaintiff, procured a cashier's check for \$21 issued by the First National Bank of Rahme, North Dakota, and payable to the order of defendant, and at Austin, North Dakota, mailed it to defendant at its home office in Topeka, Kansas, in payment of six month's assessments in advance for Ruder and his wife. Defendant's secretary, to whom assessments were payable, testified that he received no such check, and that the July assessment was never paid.

The charter of Zion Council of which Mendel Ruder and his wife were members, was forfeited in April, 1910, for reasons that are not important here. Mendel Ruder and his wife were advised of this April 22, 1910, and were notified that, in case they desired to continue their membership in the society, "national transfer cards" would be issued transferring them to some other council of the order. The Ruders replied May 10, 1910, from Austin, North Dakota, stating that they wished to continue their membership in the order, that they expected to move back to Minneapolis in a short time, and asking for transfer cards to "Israel" Council at Minneapolis. In this letter, they say: "If it is possible to send our payments direct to the National Council please advise and will do so till we are at Minneapolis." The national secretary answered this letter May 17, acknowledging the receipt of assessments for three months (paid by a money order sent to the defendant at its home office in Topeka from Austin, North Dakota, and received in payment of the April, May and June assessments), enclosing transfer cards to a new council just being organized in Minneapolis, and giving the name and address of its financier. He



did not advise whether they would be permitted to pay subsequent assessments to the home office, until they moved back to Minneapolis. It does not appear that these transfer cards were ever presented to the new council, but it does appear that the Ruders still lived in North Dakota at the time it is claimed the July assessment was paid. Under the laws of the order, when the charter of a local council is forfeited, assessments of a member of that council are payable to the national secretary, at Topeka, Kansas, until the member presents a transfer card to another local council and is admitted thereto.

1. Defendant contends that Mendel Ruder, after Zion Council was dissolved, was bound to pay his assessments to defendant at Topeka, Kansas, and that the July assessment, if paid at all, was paid at Austin, North Dakota, from which place the cashier's check is claimed to have been mailed to defendant. We do not understand counsel to argue that Ruder was bound to travel to Topeka each time an assessment was due or that he could not use the mails. The claim is rather that the mere mailing of a draft, money order or the cash, is not payment; that the assessment is not paid until the receipt of the remittance at the home office. The secretary testified, and it hardly needs evidence to establish the proposition, that it was the custom of defendant to accept drafts and money orders and cash sent through the mails. As we view the case, it is not necessary to decide between plaintiff's contention that, because defendant authorized the use of the mails in paying assessments, it would be bound by the mailing of the draft, though it was never received by the defendant, and defendant's claim that there was no payment until and unless the draft was actually received by it. It is a strong presumption that a letter duly deposited in the mails and properly addressed reaches its destination in due course of mail. We all know that it is very rare indeed that this is not the case. If the jury was justified in believing that Mendel Ruder actually mailed the cashier's check in a letter properly addressed to defendant, it was justified, applying the presumption, in finding that the payment was duly received at Topeka. The fact that the national secretary testified that it was not so received, was by no means conclusive evidence; we cannot hold as a matter of law that this testimony overcame the presumption, or

that the jury was not justified in finding that it did not. Though we are not greatly impressed with the truth of the testimony of plaintiff, we have no right to say it was unworthy of belief. This was the second trial of the case, and the witness had given substantially the same testimony in regard to mailing the cashier's check on the former trial. The burden of proof was on defendant. The trial court has approved the finding of the jury on the question, and we find no sufficient reason to interfere.

2. It is claimed that the trial court erred in not clearly answering the question asked by a juror after the charge was concluded. This question was: "Is the mailing of a letter containing a remittance—does that constitute payment?" The court did not answer this question, and we do not answer it in this opinion. In response to the juror, the court in effect said that the jury should consider the fact that the letter was mailed, if it was a fact, in determining the question whether or not the remittance was received. This was correct in itself, and we do not think it was error not to answer the question specifically. The instruction was in line with what we hold to be the law in this opinion.

3. The next claim is that the action was barred because not commenced within one year from the death of the insured. At the time Mendel Ruder joined the order, its by-laws provided that no action could be maintained upon a benefit certificate, unless brought within one year from the date of action taken by the executive committee upon the claimant's right to benefits and the proofs of death. The certificate issued to Ruder contained the same provision. In 1910, the by-laws of the order were so amended as to provide that no action upon a benefit certificate could be maintained "unless brought within one year from the death of the member." The present action was not instituted within a year of Ruder's death, but it was instituted within one year after the claim was presented to and acted upon by the executive committee. It was admitted that defendant had waived proofs of death. The question is whether the by-law adopted in 1910 is valid as against Ruder and his beneficiary. We think that the case of *Rosenstein v. Court of Honor*, 122 Minn. 310, 142 N. W. 331, is decisive of this question. The only possible distinction is

that the certificate in the Rosenstein case contained no limit of time within which the action must be commenced, whereas in the case at bar the original by-law and the certificate provided a limit of one year after the executive committee acted on the claim. This is really not a distinction, as the by-laws do not contain, nor does the certificate, any limit on the time when the claimant must make proofs of death and present his claim. Laws 1907, p. 471, c. 345, § 8 (G. S. 1913, § 3544), was enacted after Ruder's certificate was issued, and was not a part of his contract. It was not intended to apply to cases where the benefit certificate was issued prior to its passage. The Rosenstein case fully disposes of this point; following and applying that decision, the change in the by-laws did not bind Ruder, and the action was commenced in time.

4. After the jury had retired and had deliberated some hours, they asked to have the transcript of the testimony of plaintiff given on a former trial, which had been received in evidence, but only portions of it read. It is assigned as error that the court did not permit this transcript to be handed to the jury for examination. We cannot hold that this was error, even conceding the propriety of granting the request. In any event, it does not appear likely that any prejudice resulted because the jurors were compelled to rely on their recollections.

5. It would seem that this jury was conscientiously trying to reach a right conclusion. A letter written by a former attorney of plaintiff to the national secretary of defendant, asking for blanks on which to furnish proofs of death, had been received in evidence. In this letter the attorney, in apparent explanation of the delay in notifying defendant of Ruder's death, stated that Jacob Ruder did not know that his father had a benefit certificate in the order until a few days ago. As the letter was written more than a year after Ruder's death, and plaintiff had testified to the payment of dues in the order by his father, it is quite apparent that had it been written by plaintiff himself, the letter would have been evidence of the falsity of the testimony given by plaintiff. The foreman of the jury asked for this letter. It was attached to a deposition in the case, and instead of permitting the jury to take it, it was read to them, as it had been before during

the trial. This refusal of the court to detach the letter and let it go to the jury room, is assigned as error. We hold it was not.

6. Mr. Hall, defendant's attorney, took the witness stand, and testified that he had conversations with Mendel Ruder in Minneapolis on the twentieth and twenty-eighth of May, and second of June, 1910, in which Ruder made expressions to him in regard to his continuation of membership, and his intention to pay assessments in the future. When asked what these conversations were, an objection was sustained, as were objections to questions as to whether Ruder said he intended to drop his membership in the order, and not to pay future assessments. These rulings are assigned as error. The only relevancy that the evidence could have would be to show Ruder's intention not to pay future assessments. Conceding that the declarations of the insured would bind the beneficiary, we do not think there was prejudicial error in excluding this testimony. Ruder, at the time of the alleged conversations, was admittedly a member of the order in good standing. He had paid his assessments for some four years, and had recently paid for the months of April, May and June. His letters, written shortly before, express a decided intention to continue as a member of the order. There was no offer to prove. Taking everything into consideration, we are satisfied that these rulings do not justify granting a new trial.

Order affirmed.

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**ISADORE KULBERG and Another v. NATIONAL COUNCIL  
OF KNIGHTS AND LADIES OF SECURITY.<sup>1</sup>**

January 30, 1914.

Nos. 18,343—(223).

**Rules for expulsion of member.**

1. Rules and regulations of a fraternal benefit association, concerning procedure for expulsion of members, are valid and binding, if not so grossly

<sup>1</sup> Reported in 145 N. W. 120.

unfair as to be contrary to public policy; and an appeal within the order from an expulsion may be made a condition precedent to the right to resort to the courts.

**Appeal within the order from order of expulsion.**

2. To render the requirement of such an appeal operative, there must be a hearing in accordance with the laws of the order; but mere irregularities of procedure short of substantial denial of the hearing contemplated by the contract of the parties are remediable in the first instance only as provided therein.

**Question for jury.**

3. As against defendant's request for a directed verdict in an action upon a benefit certificate, evidence *held* sufficient to take the case to the jury on the question whether the hearing pursuant to which assured was expelled was such as to deprive the court of jurisdiction because no appeal was taken within the order.

**Burden of proof.**

4. The burden of establishing the fact of such hearing was on defendant.

**Expulsion not warranted.**

5. Evidence *held* insufficient to establish a valid expulsion, in that it indicated the order was based, in part at least, upon evidence taken at a time and place of which assured had no notice, or else he was justified in so believing.

**Acquiescence in order of expulsion — evidence.**

6. Evidence *held* to show neither acquiescence in the order of expulsion nor abandonment of membership.

**Tender of dues thereafter.**

7. Defendant having clearly indicated its intention to refuse further recognition of assured's membership, subsequent tender of dues and assessments was not necessary to keep the certificate of membership in force; but a recovery would be subject to deduction thereof.

**Admission of evidence harmless.**

8. Evidence upon the affirmative defense of a valid expulsion, after hearing, for certain offenses against the order, including misrepresentation of age, being such that the court would have been justified in charging failure to establish it, and this being the only issue submitted, and there being no other proper to be submitted, admission of testimony tending to refute the charge of such misrepresentation was without prejudice to defendant, though irrelevant.

Action in the district court for Ramsey county to recover \$2,000 upon defendant's certificate of insurance upon the life of Osias Kulberg. The facts are stated in the opinion. The case was tried before Quinn, J., who denied defendant's motion for a directed verdict and a jury which returned a verdict for \$1,975.56 in favor of plaintiffs. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*Harvey E. Hall and William G. White, for appellant.*

*A. J. Hertz and James E. Markham, for respondent.*

PHILIP E. BROWN, J.

Action to recover the amount of a fraternal benefit certificate. Plaintiff had verdict and judgment, defendant's motion for judgment or a new trial being denied. The latter appealed.

In 1901 Osias Kulberg became a member of one of defendant's councils and obtained the certificate sued on, which was like the one in *Marcus* against this defendant, 123 Minn. 145, 143 N. W. 265. He was expelled at the same time as assured was in that case, and what was said in the first paragraph of the opinion therein, outlining the nature and character of the order, its membership and internal management, rights of members, expulsion, etc., is equally applicable here.

In March, 1910, charges of wrong-doing were preferred against assured, to the effect that he (a) was over the maximum age limit when admitted, (b) was not then in good health and a fit subject for life insurance, (c) concealed facts relating to his age, health, and family history, (d) made misstatements relating to the same matters, (e) is not within the eligible list of beneficiaries, and (f) assisted and abetted others in securing and attempting to secure payment of fraudulent and improper claims upon the order. Later he was cited to appear before the National Executive Committee of the order in Minneapolis, on April 7, 1910, to answer these accusations. He appeared accordingly and certain proceedings were had. On April 21 and 22 the committee met at Topeka, Kansas, without notice to or knowledge of assured, found the charges sustained, and ordered ex-

pulsion and cancelation of the certificate. On April 22 defendant's secretary notified him in writing that on April 21 and 22 the committee "acting on evidence which was taken in your case in St. Paul and Minneapolis in April, 1910, by a unanimous vote of the committee, expelled you from membership and canceled your certificate. As you will readily understand, this terminates your membership in the order. \* \* \* You are further notified to send your certificate to my office at once." Assured did not appeal to defendant's National Council and never applied for reinstatement.

Defendant's answer alleged, among other things, assured's expulsion under the rules of the order, substantially as stated, and further that in the membership application he knowingly stated his age as 51 years, when in fact he was 70. Plaintiff's reply alleged that the charges preferred against assured were made with the preconceived design and intention of ousting him from membership; that he was never required or permitted to answer them or to be heard or to offer evidence in reference thereto; that no witnesses were produced or testified before the committee, and that in fact no hearing or trial on the charges was had, the pretended hearing and trial being arbitrary, unauthorized, oppressive, and void.

1. On the trial of the action, which was had in St. Paul, plaintiff introduced evidence of an interpreter, employed by defendant at the hearing before the committee, tending to show that assured and other members charged with like offenses were together in a room adjoining the one in which the committee sat; that they were called in separately, the door closed—another witness stated it was locked and the committee would not let him in—examined and dismissed; and, in assured's case, the only proceedings had, after he was called in, consisted of the committee's looking at him and asking his name, residence, and age, his reply as to the latter being 60 or 61 years. Defendant's showing of what occurred consisted in the testimony of one of its attorneys and its secretary, each of whom contradicted plaintiff's showing, affirming that assured testified at length and was accorded the opportunity of representation by counsel and production of witnesses. It appeared that some of the testimony given before the committee in the several cases was taken down by a stenographer

and a copy made, which was in possession of defendant's counsel in St. Paul, and though notice to produce was served and oral demand made on the trial, he refused to comply.

The court determined, and so charged, the sole material question of fact to be: Was assured given such hearing before the committee as defendant's laws, rules, and regulations contemplated? Beyond doubt, the accusations made, if true, were such as would warrant assured's expulsion, and likewise if he was guilty only of misrepresenting his age in his application for membership. Neither can the right of parties, in associations of this kind, to agree upon the procedure concerning expulsions be questioned, if not so grossly unfair as to be contrary to public policy; and unquestionably they may make appeal within the order a condition precedent to resort to the courts where the procedure provided for has been substantially followed. See *Marcus v. this defendant*, *supra*. So, also, it must be held that outside the matter of hearing and notice of expulsion and cancellation, the proceedings had were adequate to require recourse to this remedy. We agree, therefore, with the trial court, that the only material question of fact, if any, was as charged. Defendant, however, contends it conclusively appears that no errors or irregularities occurred in the conduct of the hearing or proceedings resulting in assured's expulsion, prejudicial to his rights or dispensing with the necessity of an appeal within the order, and hence that no issue of fact was raised and it was entitled to a directed verdict. This presents the vital question. Its importance is self-suggestive when we consider the number of similar organizations now doing business and their large membership. Such associations are insurance companies. As said in *Lindahl v. Supreme Court* I. O. F. 100 Minn. 87, 91, 110 N. W. 358, 359, 8 L.R.A.(N.S.) 916, 117 Am. St. 666:

"Many of the so-called benevolent and fraternal associations which are largely engaged in the life insurance business can no longer be treated as charitable organizations. Their insurance features are but remotely connected with the charitable and benevolent work of the orders. Their certificates are simply insurance contracts, and the benefits to which the members are entitled thereunder result from the payment of full and adequate consideration."



The power of a committee, vested by the association with quasi-judicial functions in the premises, to expel a member must, therefore, be subject to some limitation. It would not be contended that a binding expulsion could be ordered without any hearing whatever, or upon one so irregular as to be wholly unauthorized by the fundamental law of the order. *Horgan v. Metropolitan Mut. Aid Assn.*, 202 Mass. 524, 529, 88 N. E. 890; Bacon, Ben. Soc. § 101. On the other hand, mere irregularities of procedure, short of a substantial denial of the hearing contemplated by the contract of the parties, are remediable in the first instance only as provided therein; from which it follows that if it conclusively appears such a hearing as that last indicated was had, plaintiff cannot maintain this action.

If plaintiff's witnesses are worthy of credence, their testimony, taken in connection with defendant's documentary evidence, established assured's conviction of the six independent and disconnected violations of duty before mentioned, merely upon his inspection by the committee and the disclosure of his name, residence and age, conforming to the application for membership. We are not prepared to hold as a matter of law, if this version be true, that the hearing was within the rules of the order. The proceeding was of importance. Assured had paid premiums for 10 years. It is generally known that forfeitures like the present one prevent the obtaining of other insurance entirely, or else at increased cost. Only a strained construction of the laws of this order would permit a holding that either party contemplated action of the kind disclosed by these witnesses. Nor can we say that their testimony is unworthy of belief, especially when it is reinforced by the presumption arising from defendant's nonproduction of the testimony claimed to have been taken down by the stenographer, and when, moreover, we consider the interest of defendant's witnesses in the event of the suit. (Note 59 Am. St. 207). As said in *Jones*, Evidence (2d ed.) § 19:

"The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party. It is a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties

have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable."

See, also, section 20 of the same work, and 16 Cyc. 1059. This presumption is ordinarily to be taken as strongly sustaining the other evidence adduced. We hold the evidence sufficient to take the question indicated to the jury.

Nor is this conclusion in any wise opposed to that in the *Marcus* case, *supra*, relied on by defendant as presenting issues substantially identical with those in the present case and as determinative thereof. In the latter it does not appear from the answer either what charge was made against assured or of what he was found guilty. Moreover, the reply in the former was substantially a general denial, whereas here the good faith of the proceedings and the fact of any hearing on the charges made was directly challenged. The courses of the trials and the proofs received in the two cases were also materially different. In the former the controversy related solely to the question of the assured's age, it appeared he was advised that his expulsion rested on this ground, and the notice thereof was essentially different from the one here involved. Furthermore, there was persuasive evidence of acquiescence in the determination of the committee and abandonment of membership; while here we have evidence to the contrary. In short, the issues in the *Marcus* case were so different from those here presented, that the decision therein is neither controlling nor materially in point on the question under discussion.

2. What has been said above with respect to the matter of hearing might seem to dispose of this case so far as concerns that question, but nevertheless another aspect thereof requires consideration. Presumptions favorable to a forfeiture cannot be indulged. *Ibs v. Hartford Life Ins. Co.* 119 Minn. 113, 117, 137 N. W. 289. And defendant bore the burden of establishing expulsion proceedings sufficient under the laws of the order to require assured to appeal or to be bound by the determination. See *Ibs v. Hartford Life Ins. Co.* *supra*; *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 261, 33 N. W. 663. Proceedings without notice to assured or which ignored his right to be present at all times and to hear all testimony presented and proofs of-

ferred and to cross-examine, not only cannot be deemed hearings but must be held nullities. If, therefore, it appears that evidence was taken by the committee at a time or place without notice to him or proof of his consent, or that defendant's conduct justified assured in believing such was the fact, the forfeiture cannot stand. Assured's notification of expulsion came from defendant's secretary, who was present at the meeting of the committee in Minneapolis, and by it he was advised that the committee "acting on evidence which was taken in your case in St. Paul and Minneapolis in April, 1910," had expelled him and cancelled his certificate. But no notice of or consent to any meeting except the one in Minneapolis was shown, and what evidence, if any, was taken in St. Paul does not appear. Clearly no forfeiture can be sustained on such a record. Moreover, assured had the right to assume the notification of expulsion stated facts, and hence to ignore it; and defendant has no just cause to complain if he did so. We adopt the following from *Dick v. International Congress*, 138 Mich. 372, 377, 101 N. W. 564, 565:

"Plaintiff was entitled to the hearing prescribed by defendant's by-laws. The construction which defendant itself placed on these by-laws—and, in my judgment, their proper and necessary construction—required it to dispose of controversies upon testimony of some character produced before it at a time and a place where plaintiff had an opportunity of being heard. We have held, in accordance with fundamental constitutional principles, that an adjudication made by such tribunal is not binding upon a party who is denied the opportunity of being heard. See *Rose v. Supreme Court, Order of Patri-cians*, [126 Mich. 577, 85 N. W. 1073] *supra*." "The most obvious and essential rights secured to claimant by the opportunity of being heard are these: The right to present testimony, and the right to hear and meet testimony presented against her. If her claim was rejected upon testimony obtained when she was not present, and of which she knew nothing, we should not hesitate to say that she was denied the opportunity of being heard, even though permitted to introduce testimony tending to support her claim. In such a case it would be clear that, though given a hearing in form, claimant was

deprived of all advantage of such hearing, and was therefore denied the hearing to which she was lawfully entitled."

The defect in the proceedings thus disclosed goes beyond mere irregularity, and involves a forfeiture so entirely unsupported either by contract or law that, we think, a court would not have hesitated, by mandamus, to reinstate. (Note 59 Am. St. 200.) Certainly, then, liability on the policy should not be denied on account thereof. See opinion of Judge Seymour D. Thompson in *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Bacon, Ben. Soc.* § 104, note 59 Am. St. 204, et seq.

3. Assured failed to apply for reinstatement, and defendant, claiming he also neglected to disaffirm the order of expulsion, insists that his beneficiaries are barred by his acquiescence therein and abandonment of membership. The facts, however, show neither. Six days after notification of expulsion, he wrote defendant's secretary:

"It must be some error in regard to my expulsion from membership of this order, and really believe that you are unjustified in doing so."

With this communication he returned defendant's draft sent to reimburse him for assessments and lodge dues paid pending investigation, and also enclosed a money-order for \$4 in payment of assessments and dues for May; the latter being thereafter returned to him, with the secretary's reiteration of his expulsion and cancelation of his certificate, and remaining in his possession until his death, May 27, 1912, and subsequently in plaintiff's possession. Defendant, moreover, having clearly indicated its intention to refuse further recognition of assured's membership, subsequent tender of dues and assessments was not necessary to keep his certificate in force. *Ibs v. Hartford Life Ins. Co.* 121 Minn. 310, 141 N. W. 289. See also, *Langnecker v. Trustees of Grand Lodge*, A. O. U. W. 111 Wis. 279, 87 N. W. 293, 55 L.R.A. 185, 87 Am. St. 860; *Byram v. Sovereign Camp*, 108 Iowa, 430, 79 N. W. 144, 75 Am. St. 265; *Plattdeutsche v. Ross*, 117 Ill. App. 247. But a recovery would be subject to deduction thereof.

4. Testimony of several witnesses was received, over defendant's objection and exception, showing that the actual age of assured was as stated in his application for membership. This was irrelevant to the issue outlined by the court; but no prejudice resulted, for, as indicated in subdivision 2 of this opinion, the court would have been justified in charging that defendant had failed to establish a defense. Judgment affirmed.

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JOHN MELAND v. A. F. YOUNGBERG.<sup>1</sup>

January 30, 1914.

Nos. 18,402—(201).

**Sale — warranty — parol evidence.**

1. Where a written contract for the sale of personal property is complete in itself and fails to disclose the existence of a warranty, parol evidence is not admissible for the purpose of proving a warranty.

**Construction of contract of sale.**

2. Whether the written contract expresses the entire agreement of the parties must be determined from the contract itself in the light of the subject-matter with which it deals and of the circumstances attending its execution.

**Parol evidence to prove fraud.**

3. Parol evidence is admissible for the purpose of proving fraud and deceit.

**Action for deceit — false representations.**

4. To maintain an action for deceit based upon false representations, it is incumbent upon plaintiff to show that he relied upon such representations and was deceived thereby to his injury.

<sup>1</sup> Reported in 145 N. W. 167.

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Note.—The question of the right to show parol warranty in connection with a contract of sale of personalty is discussed in a note in 19 L.R.A.(N.S.) 1183.

As to the purchaser's right to rely on representations as to title to real property, see note in 39 L.R.A.(N.S.) 1143. And on the general question of the right to rely on representations, see note in 37 L.R.A. 593.

**Same.**

5. If a purchaser relies in part upon his own examination as to the character and condition of the property, and in part upon the representations of the adverse party and is deceived thereby to his injury, he may maintain an action for such deceit.

**Same — personal investigation by buyer.**

6. But if the purchaser undertakes to and does investigate and determine the entire matter for himself, and is afforded an opportunity to make his investigation as full and complete as he chooses, and he then accepts the property, he cannot be heard thereafter to assert that he relied upon misrepresentations of the adverse party. In the instant case, it is *held* that the admitted facts bring plaintiff within this rule.

Action transferred to the district court for Becker county. The complaint alleged two causes of action, the first for damages for alleged fraud and deceit in the exchange of certain machinery and the second for damages for breach of an alleged oral warranty. The substance of the complaint is stated in the opinion. The case was tried before Nye, J., who granted defendant's motion to dismiss the action. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

*Christian G. Dosland*, for appellant.

*Johnston & Dennis*, for respondent.

**TAYLOR, C.**

Plaintiff and one John Chial were the owners, subject to a chattel mortgage, of a steam plowing rig consisting of a 25 horse-power Reeves engine and 10 plows. Defendant was the sole owner of a second-hand 22 horse-power gasolene traction engine, and he and Chial were the owners of six plows used therewith. On December 18, 1911, plaintiff and defendant entered into the following contract for the exchange of properties which was executed in duplicate:

"This agreement made and entered into by and between A. F. Youngberg party of the first part and John Meland party of the second part:

"In consideration of a deal by and between the above mentioned parties, whereby the first party to this agreement becomes the owner

of the second party's one-half interest in his One Reeves 25 H.P. steam engine and plows and the second party becomes the owner of the first party's sole interest in one 22 H.P. traction Hart Parr Gasolene engine all complete and in running order, and six traction plows now in Ulen. In consideration of the above deal the first party agrees to assume the second party's share of his indebtedness for the Reeves Steam engine, which is evidenced by notes and secured on said engine to the amount of \$1,787.50 Dollars and of which the first party agrees to assume and pay the sum of \$893.75 Dollars, being the second party's share of indebtedness in the above steam engine.

"First party is to receive the sum of \$528.24 Dollars, being the difference in the deal between the first and second party and which is to be paid by the second party in sums as follows:

"Notes secured on 22 H. P. gasolene engine.

"One Hundred Dollars on demand or when gasolene engine is accepted by the second party.

"Two Hundred & Fourteen & 12/100 Dollars due Nov. 1st, 1912.

"Two Hundred & Fourteen & 12/100 Dollars due Nov. 1st, 1913.

"Notes payable on or before with interest at the rate of 7% per annum payable annually.

"The first party to this agreement has inspected the steam engine that he is to receive and accepted same to be as represented and this agreement to be binding on him.

"It is agreed that said second party or his agent may view the gasolene engine above-mentioned, and, if found to be otherwise than as represented or as understood by said second party, this agreement to be null and void and not binding on the second party to this agreement.

"Notes and mortgages as above mentioned have been left in The First National Bank of Ulen, Minn. in escrow pending consummation of this agreement.

"A. F. YOUNGBERG

"JOHN MELAND

"Witnesses.

"L. Lofgren

"E. A. Westin."

The contract was executed at Ulen, Minnesota, where plaintiff resided, and plaintiff, defendant and Chial were present. The notes and chattel mortgage provided for in the contract were also executed at the same time. In connection with the transaction, plaintiff paid Chial \$225 for his interest in the plows belonging to the gasoline outfit. In the complaint, plaintiff alleged that he made this payment at the instance and on behalf of defendant, and under an agreement that the amount thereof should be indorsed as a payment upon the notes mentioned in the contract. Defendant denied this. It is not necessary, however, to consider this issue, for, as we understand the stipulation made at the close of the trial, this payment, and the questions concerning it, were withdrawn and eliminated from the case.

When the contract was executed, the steam rig was in plaintiff's possession at Ulen and the plows belonging to the gasoline rig were also at Ulen, but the gasoline engine was at Sykston, North Dakota. It is admitted that one copy of the contract and the notes and chattel mortgage were to be held by the bank at Ulen, until plaintiff should examine and accept the gasoline engine; and it is also admitted that in case he accepted the engine he was to take it at the place where it was then located. Toward spring plaintiff sent one Hanson to Sykston to examine the engine, and gave him authority to accept it and ship it to Ulen, if found to be satisfactory. Hanson examined and accepted the engine, and on March 1, 1912, shipped it to Ulen, and made the following indorsement upon one of the duplicate contracts:

Sykston, N. D. Mch. 1st, 1912.

I, Haakan Hanson, accept this Hart Parr Gasolene-engine now owned by A. F. Youngberg, with the understanding that A. F. Youngberg, party of the first part, is to furnish a new right-hand cylinder & John Meland, party of second part, to furnish all other repairing.

"HAAKAN HANSON

"Agent for John Meland."

It is admitted that defendant promptly furnished the new cylinder. It is also admitted that, after the arrival of the engine at Ulen, plaintiff and defendant went to the bank together and indorsed upon the duplicate contract held by the bank the form of acceptance already indorsed upon the other duplicate by Hanson, and that plaintiff him-



self then signed this acceptance, and that immediately thereafter by his direction the notes and chattel mortgage held in escrow by the bank were delivered to defendant. Plaintiff thereupon removed the gasoline rig from the railway station, and, about a month later, defendant took possession of and removed the steam rig from plaintiff's premises.

In February, 1913, plaintiff brought this suit and set forth two causes of action, the first for damages for alleged fraud and deceit, and the second for damages for breach of an alleged oral warranty. Both causes of action are based upon the same facts, and rest upon the averment that, during the negotiations which preceded the making of the contract, defendant represented, in substance, that the gasoline-engine was a first-class engine, well made and in first-class condition and repair; and that it would do first-class work, would develop as much power and give as good satisfaction as a new engine of the same make, and would develop sufficient power to haul six plows in operation. Plaintiff further alleged that he relied upon these representations; that they were not true; and that defendant knew that they were not true at the time of making them.

At the trial the court excluded all oral testimony offered for the purpose of proving these representations, upon the ground that they tended to vary the terms of the written contract, and that plaintiff was concluded by such contract, and by his examination and acceptance of the property under and in accordance with the terms thereof. At the close of plaintiff's case the action was dismissed on motion of defendant. Plaintiff made a motion for a new trial which was denied and he appealed.

The only question for determination is whether the court erred in excluding the proffered testimony.

No claim is made that the written contract was not fully understood, nor that it failed to contain the exact terms and provision which the parties agreed should be embodied therein.

1. It is the settled law of this state that a warranty made in connection with the sale of personal property is a part of the contract of sale; and, if the contract of sale is in writing and is complete in itself and fails to disclose the existence of a warranty, that parol evidence

of a warranty is not admissible, for the reason that it would vary the terms of the contract as expressed in the writing. *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *McCormick Harvesting Machine Co. v. Thompson*, 46 Minn. 15, 48 N. W. 415; *Bradford v. Neill*, 46 Minn. 347, 49 N. W. 193; *Wisconsin Red Pressed-Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *D. M. Osborne & Co. v. Josselyn*, 92 Minn. 266, 99 N. W. 890; *McNaughton v. Wahl*, 99 Minn. 92, 108 N. W. 467, 116 Am. St. 389. Whether the written contract is complete and expresses the entire agreement of the parties must be determined from the contract itself, in the light of the subject-matter with which it deals and of the circumstances attending its execution. *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* 66 Minn. 156, 68 N. W. 854; *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011; *McNaughton v. Wahl*, 99 Minn. 92, 108 N. W. 467, 116 Am. St. 389; *Minnesota Trading Co. v. Penn Oil & Supply Co.* 108 Minn. 221, 121 N. W. 907; *Grant v. King*, 117 Minn. 54, 134 N. W. 291.

The contract in controversy, when so considered, is complete in itself; and the express reservation to plaintiff of the right to examine the engine and to determine, after such examination, whether he would accept or reject it, indicates that the parties did not have in contemplation the existence of a warranty as an element of the contract. The proffered testimony was not admissible for the purpose of proving the alleged warranty.

2. Parol evidence is admissible, however, for the purpose of proving fraud and deceit. *Kerrick v. G. W. Van Dusen & Co.* 32 Minn. 317, 20 N. W. 228; *Cooper v. Finke*, 38 Minn. 2, 35 N. W. 469; *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439; *Vilett v. Moler*, 82 Minn. 12, 84 N. W. 452; *O'Malley v. Great Northern Ry. Co.* 86 Minn. 380, 90 N. W. 974. The testimony tendered was competent for that purpose and should have been admitted, unless it appeared from the undisputed facts that plaintiff was not entitled to recover, even if he proved the misrepresentations charged.

To establish a claim for damages based upon the making of false representations, plaintiff must show that he relied upon such repre-

sentations to his injury. Although one party may make representations which are untrue, yet, if the other party, instead of relying thereon, makes an independent investigation of his own, either in person or through his agents, and acts upon the result of such investigation without regard to the representations made by the adverse party, the rule is well-nigh universal that such representations do not give rise to a cause of action. The following brief excerpts will serve to indicate the views expressed by the courts.

"Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterward allege that the vendor made misrepresentations." *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 281, 31 L. ed. 678.

"No representation can amount to an actionable deceit or fraud which is not relied on by the party claimed to be defrauded. If he has an opportunity to make an examination of the article purchased as to quality, and does so, and acts on his own judgment, there is no room for deceit." *Moses v. Katzenberger*, 84 Ala. 95, 4 South. 237.

"It is held that, even, if fraudulent representations are made respecting a given subject, and the party to whom the representations are made does not rely upon such representations, but seeks from other quarters to verify the statements made, he cannot afterwards claim that a deceit has been practiced upon him by the party originally making the representations. *Bigelow on Fraud*, 87, and cases cited." *Anderson v. McPike*, 86 Mo. 293.

"While it is true fraud vitiates all contracts, yet every false affirmation does not amount to a fraud. A knowledge of the falsity of the representation must rest with the party making it, and he must use some means to deceive or circumvent. *Walker v. Hough*, 59 Ill. 375. The fact that appellants made a personal examination of the logs before making the contract, shows that they did not rely upon what was said by Wilcox; and the fact that Wilson insisted upon an examination, repels the idea that he was trying to deceive." *Fauntle-roy v. Wilcox*, 80 Ill. 477.

"Where it is shown, as in this case, that a person has ample op-

portunity of examining for himself, he cannot rest his rights upon the statements of others. It is his business to inquire into and ascertain what those rights are. 'A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness.' *Slaughter's Admr. v. Gerson*, 13 Wall. 379, [20 L. ed. 627.]" *Short v. Pierce*, 11 Utah, 29, 39 Pac. 474.

"Where one has the opportunity to examine for himself and fails to do it, but purchases on the representations of another, if he be deceived, he must suffer from carelessness and want of care. So, if in a case like the one at bar, where the means of information were not only accessible, but were availed of, and a personal examination made, equity will not allow him to say that he was induced to purchase on the statements and representations of the vendor. *Morgan v. Snapp*, 7 Porter (Ind.) 537; *Bolton v. Branch*, 22 Ark. 435; *Adam's Equity*, 179, 187." *Grider v. Clopton*, 27 Ark. 244.

"When a party buys property, relying on his own judgment, he cannot avoid the contract on account of misrepresentations." *Hess v. Young*, 59 Ind. 379.

"We also think the evidence utterly fails to show that plaintiff believed these representations, and relied on them in making the purchase. It is true that in his examination in chief he states generally that he relied on them; but his cross-examination conclusively shows that he did not rely on them *as true* when he made his purchase. \* \* \* He made his purchase, not because of any belief in their *truthfulness*, but because he thought Merriam would be liable as warrantor to make them good if they proved untrue. On such a state of facts, as the court below well remarked, if plaintiff made out anything, it was a cause of action on a warranty and not for deceit." *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138.

"Where one investigates fully for himself, he cannot claim reliance on the representation of another; but partial investigation and reliance in part will not bar an action for deceit." *Freeman v. F. P. Harbaugh Co.* 114 Minn. 283, syllabus, 130 N. W. 1110.

To the same effect are the following: *Cobb v. Wright*, 43 Minn. 83, 44 N. W. 662; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct.

771, 34 L. ed. 246; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. ed. 931; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627; *Wade v. Ringo*, 122 Mo. 322, 25 S. W. 901; *Tuck v. Downing*, 76 Ill. 71; *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Attwood v. Small*, 6 Clark & F. 232; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. 196; *Bell v. Byerson*, 11 Iowa, 233, 77 Am. Dec. 142; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 16 Am. St. 137; *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59; *Port v. Williams*, 6 Ind. 219; *Pearce v. Carter*, 3 Houst. (Del.) 385; *Leavitt v. Fletcher*, 60 N. H. 182; *Weaver v. Shriver*, 79 Md. 530, 30 Atl. 189.

Many cases hold that, if the buyer can investigate and determine the facts for himself and has been afforded a proper opportunity to do so, he is wanting in ordinary prudence, if he rely upon the representations of the adverse party instead of making such investigation, and that he cannot maintain an action for deceit based upon representations as to matters which he ought to have determined for himself.

This court, however, in consonance with the weight of authority has held that, if the buyer, instead of investigating as fully as he might, made only a partial investigation, and relied in part upon such investigation and in part upon the representations of the adverse party, and was deceived by such representations to his injury, he may maintain an action for such deceit. *Moline-Milburn Co. v. Franklin*, 37 Minn. 137, 33 N. W. 323; *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811; *Freeman v. F. P. Harbaugh Co.* 114 Minn. 283, 130 N. W. 1110; *Brown v. Andrews*, 116 Minn. 150, 133 N. W. 568; *Rudolphi v. Wright*, *supra*, page 24, 144 N. W. 430.

But, if the buyer undertakes to investigate and determine the entire matter for himself, and is afforded a full and fair opportunity therefor, and in fact does make such investigation, and is permitted to make it as full and complete as he chooses, and he accepts the property after such investigation, the authorities are practically unanimous that he cannot be heard thereafter to assert that he relied upon the representations of the adverse party.

Of course, if by trick or artifice he was prevented from discovering some material fact, or induced to omit some examination or inquiry which would have disclosed matters of which he was ignorant, such trick or artifice may constitute actionable fraud.

In the case at bar, plaintiff undertook to investigate and determine for himself whether he would accept the engine. To secure him the absolute right to reject it and annul the contract, if he should so elect, the notes and mortgage were not delivered, but were to be held by the bank until he should make his decision. He sent Hanson to make the examination, and authorized him to accept the engine, if found to be satisfactory, and to reject it if not found to be satisfactory. He directed Hanson, if he accepted the engine, to take possession of it and ship it to Ulen. Hanson went to Sykston and made the examination. The nature and extent of his investigation does not appear, but, as he was at Sykston for two weeks, he certainly had sufficient time to make it reasonably complete. No claim is made that it was not as full and complete as he desired, nor that defendant interfered with or restricted his investigations in any manner. Neither is it claimed that he had any knowledge of the representations alleged to have been made by defendant.

As the result of his own personal investigation, he accepted the engine and shipped it to Ulen in accordance with his instructions. After it reached Ulen, plaintiff himself accepted it by a formal indorsement upon duplicate contract held by the bank, made for the express purpose of informing the bank that he had satisfied himself as to the engine and that the time had arrived for the bank to deliver the notes and mortgage.

The admitted facts show that plaintiff undertook to determine the entire matter for himself; that he made his own independent investigation and acted upon his own judgment or that of his representative, and it necessarily follows that he is precluded from now asserting that he relied upon the representations of the defendant.

Order affirmed.

**STATE ex rel. H. A. GRAVES v. C. G. HAUGEN.<sup>1</sup>**

January 30, 1914.

Nos. 18,593—(311).

**Habeas corpus — practice.**

1. Certain matters of practice in habeas corpus proceedings, relating to jurisdiction of court commissioners and hearing on appeal, determined.

**Appeal from order of committing magistrate.**

2. The determination of a committing magistrate will not be disturbed on habeas corpus where the record discloses evidence reasonably tending to support it.

Upon the petition of W. M. O'Hara the district court for Aitkin county issued its writ of habeas corpus, directing C. G. Haugen, as sheriff of that county, to have H. A. Graves before the court commissioner of Aitkin county at the time and place mentioned. The sheriff objected to the jurisdiction of the court commissioner to hear or determine the matter for the reason that the writ was not attested in the name of the presiding judge of the district court; that the sheriff had no person by the name of H. A. Graves in his custody, nor was there such a proceeding on record in the district court of the county; that no bond had been given as security for payment of costs on the part of the relator or in his behalf; and that the petition did not set out facts sufficient to justify the issue of a writ of habeas corpus. Upon the return of the writ the prisoner was ordered discharged by the court commissioner. From the order discharging the prisoner from the custody of the sheriff, the sheriff appealed. *Reversed.*

*Lyndon A. Smith*, Attorney General, and *Louis Hallum*, County Attorney, for appellant.

*W. M. O'Hara*, for respondent.

<sup>1</sup> Reported in 145 N. W. 167.

PHILIP E. BROWN, J.

Relator, after examination, was committed by a justice of the peace in default of bail, to answer to the criminal charge, prescribed by G. S. 1913, § 8699, of knowingly entering into a marriage with a married woman. On petition alleging illegality of his imprisonment in that there was no proof either of the woman's previous marriage or relator's knowledge thereof at the time of the marriage charged, the court commissioner of the county ordered issue of a writ of habeas corpus returnable before himself, and after hearing discharged him for insufficiency of the evidence to warrant the magistrate's decision. The sheriff appealed.

1. Petitions for writs of habeas corpus, unless made to this court, should be addressed to the district court (G. S. 1913, § 8284); and, while the court commissioner of the county may grant them (*Id.*), they should be tested in the name of the presiding judge (section 146). However, attestation in the name of the court commissioner constitutes mere defect of form, rendered unavailing by section 8288.

Section 8312 was intended to speed the hearing of appeals; but relator, having made no application thereunder, is in no position to invoke its provisions.

2. Court commissioners have jurisdiction to hear and determine habeas corpus proceedings. *State v. Hill*, 10 Minn. 45 (63); *Betts v. Newman*, 91 Minn. 5, 97 N. W. 371. But none, after examination or trial had, to rejudge the disposition attacked by weighing the evidence given before the magistrate. Their powers in this regard are confined to an examination of the evidence for the purpose of ascertaining whether the determination of the magistrate is entirely unsupported thereby. If, therefore, the record contains evidence reasonably tending to sustain it, the decision of the justice must stand. In *re Snell*, 31 Minn. 110, 16 N. W. 692; *State v. Hayden*, 35 Minn. 283, 28 N. W. 659; *State v. Justus*, 85 Minn. 114, 88 N. W. 415. Any other rule would entail endless confusion, and likewise the anomaly of the several courts of record, court commissioners, and justices of the peace, with concurrent jurisdiction as examining magistrates (section 9072), yet upsetting each other's conclusions by passing



anew upon the weight of evidence and determining the credibility of witnesses neither seen nor heard by them.

For obvious reasons it would be inexpedient to review the evidence. We have examined the record and find evidence, direct as to the woman's prior marriage and circumstantial as to relator's knowledge, sufficient to uphold the justice's finding. See *State v. Yoder*, 113 Minn. 503, 130 N. W. 10.

It follows that relator was not illegally detained. The order discharging him is reversed, and he is remanded, if not on bail, to the official custody of appellant.

So ordered.

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## CATHERINE HUGHES v. MODERN WOODMEN OF AMERICA.<sup>1</sup>

February 6, 1914.

Nos. 18,219—(60).

### **Change of beneficiary — vested interest.**

1. The beneficiary named in a benefit certificate, issued by a fraternal beneficiary association, acquires no vested interest thereunder until the death of the assured, and his expectant interest may be defeated at any time prior thereto by the proper substitution of another in his stead, but his interest becomes fixed and vested at such death and cannot be defeated thereafter.

### **Change of beneficiary — requisite action before death of assured.**

2. If the assured has done all the things required of him to make a change in beneficiary, his death before the issuance of the new certificate required by the by-laws will not defeat such change, in the absence of an express provision in the contract specifying when the change shall take effect.

<sup>1</sup> Reported in 145 N. W. 387.

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Note.—As to the effect of death of assured before contemplated change of beneficiary is complete, see note in 34 L.R.A.(N.S.) 277. And upon the power of the insured to destroy rights of beneficiary, see note in 49 L.R.A. 737. .

Same.

3. Where the contract provided that "no change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force," and the request for the change was not received until after the death of the member, the proposed change did not become effective.

Action in the district court for Ramsey county to recover \$2,000 upon defendant's benefit certificate of insurance upon the life of John Hyland. The facts are stated in the opinion. The case was tried before Kelly, J., who submitted to the jury the single question of whether the insured had misrepresented his age, and a jury which returned a verdict in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*Benjamin D. Smith and Percy D. Godfrey, for appellant.*

*Daniel W. Doty, for respondent.*

TAYLOR, C.

Defendant, a fraternal beneficiary association, issued a policy or benefit certificate for \$2,000 to John Hyland in which plaintiff, his sister, was named as beneficiary. After the death of her brother, plaintiff brought this suit in the district court of Ramsey county to recover the amount of the insurance. The association in its answer asserted that the insurance had been obtained by means of fraudulent misrepresentations as to the age of Hyland, and also that he had substituted his daughter, Anna Hyland Tierney, as beneficiary in place of plaintiff. At the trial it appeared that the daughter had brought suit in the district court of Hennepin county to recover for the same insurance. At the close of the testimony, the court struck out all the evidence tending to show that the daughter had been substituted as beneficiary, and submitted to the jury the single question of whether the insured had misrepresented his age. They returned a verdict for plaintiff. Defendant moved for a new trial and appealed from the order denying the motion.

The sole question presented to this court is whether the trial court

erred in holding that the evidence was not sufficient to establish a valid change of beneficiary.

The by-laws are a part of the contract and provide:

"Section 47. If a member in good standing at any time desires a change in his beneficiary or beneficiaries and to obtain a new certificate, he shall pay to the camp clerk a fee of fifty cents and deliver to him his benefit certificate, with the surrender clause on the back thereof duly filled out and executed by him, designating therein the change desired in the beneficiary or beneficiaries. The execution of such surrender clause by the neighbor shall be in the presence of, and attested by his camp clerk. If, however, the member be so situated that he cannot execute the said surrender clause in the presence of the clerk of his camp, the signature of the member thereto may be attested by the jurat or acknowledgment of any person authorized by law to administer oaths and take acknowledgments, and the same shall be forwarded to the clerk of his local camp. The local clerk shall deposit one-half of the said fee of fifty cents in the general fund of the camp, and forward said certificate, with said surrender clause indorsed thereon, and the remaining one-half of said fee to the head clerk, who shall thereupon issue a new benefit certificate payable to the beneficiary or beneficiaries named in said surrender clause, depositing the fee of twenty-five cents in the general fund of the society. No change in the designation of beneficiary or beneficiaries shall be effective until the old certificate shall have been delivered to the head clerk and a new certificate issued during the life-time of the member, and until such time the old certificate shall remain in force. The new beneficiary or beneficiaries so named shall be within the description of beneficiaries contained in section 45 hereof. No change in the designation of the beneficiary shall be of binding force unless made in compliance with this section.

"Section 48. \* \* \* In case a benefit certificate is lost, destroyed, or beyond the member's control, he may, in writing, on form furnished by the head clerk, waive all claims thereunder, designate the same or some other beneficiary, the same or a smaller amount of benefits, and have a substitute certificate issued by filing the said waiver with, and paying to his camp clerk a fee of fifty cents. There-

upon the camp clerk shall forward to the head clerk said waiver and one-half of said fee, whereupon a substitute certificate shall be issued as requested. No change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force."

John Hyland delivered his benefit certificate to his sister shortly after its issuance, and, although she visited him frequently during his last illness, he never asked her to return it. On the afternoon of Saturday, August 19, 1911, he executed and acknowledged an instrument in writing in which, among other things, he stated:

"I certify that it is not within my power to surrender said benefit certificate for the reason that same is beyond my control under the following circumstances, to the best of my knowledge, viz: Is beyond my control, my sister has the certificate and will not surrender the same, but I affirm that I have not transferred or assigned said benefit certificate to any person or persons, and that said certificate is not held or controlled by any person or persons, with my consent, except as above stated. In consideration of the issuance and delivery to me of a new benefit certificate for \$2,000 payable to Anna Hyland Tierney who bears relationship to me of daughter, I hereby waive all right and benefits which I have heretofore claimed, which I may now have, or which may in the future accrue under said certificate No. 235,614, and I declare and agree that said certificate shall become null and void from the date the new certificate, hereby applied for, shall be issued by the head clerk, if such new certificate shall be issued during my lifetime. I hereby apply for and agree to accept in lieu of said certificate the new benefit certificate hereby applied for, and should the aforesaid benefit certificate be recovered, I agree to return and surrender same to the head clerk of the Modern Woodmen of America."

This document with the proper fee was delivered to the clerk of the local camp in St. Paul by the daughter about seven o'clock in the evening of the day on which it was executed. On the following day, Sunday, August 20, John Hyland died. On Monday morning, August 21, the clerk of the local camp mailed the document with the

proper fee to the head clerk at Rock Island, Illinois, but the new certificate requested was never issued.

The rights of the beneficiaries named in benefit certificates issued by fraternal beneficiary associations attach and become vested at the death of the assured and not prior thereto. Until the beneficiary acquires a vested interest in the fund by reason of the death of the assured, he possesses a mere expectancy which the assured may defeat at any time by substituting another in his stead, if such substitution be made according to the rules and regulations of the order. Under the certificate in controversy, John Hyland had the absolute right to designate his beneficiary and to change such designation at his pleasure, subject only to the requirement that the person substituted be within the class of persons eligible as beneficiaries, and that the substitution be made in the manner provided by the contract between himself and the association. His daughter was eligible as beneficiary; but whether she became substituted as such depends upon whether the execution of the instrument in which she was named as beneficiary, and the filing of the same with the clerk of the local camp, and the payment of the proper fee, were sufficient to bring about that result.

Where the contract between the assured and the association prescribes how a change of beneficiary shall be made, it is the general rule that such change can be made only in the manner prescribed. *Vanasek v. Western Bohemian Fraternal Assn.* 122 Minn. 273, 142 N. W. 334.

As pointed out in the *Vanasek* case, there are certain well recognized exceptions to this rule.

If the assured has done all the things required of him in order to make a change of beneficiary, and the only thing lacking to complete such change is the doing of some ministerial act on the part of the association, such as the making of a proper record of the change and the issuing of a new certificate, the death of the assured before the completion of such ministerial acts will not defeat the change, in the absence of an express provision in the contract fixing the time when the change shall take effect, or specifying the act which shall effectuate the change. *Supreme Conclave v. Cappella*, (C. C.) 41

Fed. 1; *Holden v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *National American Assn. v. Kirgin*, 28 Mo. App. 80; *Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388, 9 L.R.A. 534, 20 Am. St. 754; *Lahey v. Lahey*, 174 N. Y. 146, 66 N. E. 670, 61 L.R.A. 791, 95 Am. St. 554; *Jory v. Supreme Council*, 105 Cal. 20, 38 Pac. 524, 26 L.R.A. 733, 45 Am. St. 15; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *Supreme Lodge v. Terrell*, (C. C.) 99 Fed. 330; *Hall v. Allen*, 75 Miss. 175, 22 South. 4, 65 Am. St. 601; *John Hancock M. L. Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5; *Marsh v. American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 4 L.R.A. 382; *Bacon, Ben. Soc.* §§ 309, 310, 310a.

The return of the original certificate may be excused if its return be impracticable. *Supreme Conclave v. Cappella*, (C. C.) 41 Fed. 1; *Lahey v. Lahey*, 174 N. Y. 146, 66 N. E. 670, 61 L.R.A. 791, 95 Am. St. 554; *Jory v. Supreme Council*, 105 Cal. 20, 38 Pac. 524, 26 L.R.A. 733, 45 Am. St. 17; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *Spengler v. Spengler*, 65 N. J. Eq. 176, 55 Atl. 285. The cases already cited show that, if the precedent conditions had been so far performed that the association ought to have completed the change, or with proper diligence could have done so, the courts will consider the change as having been effected.

But when the contract between the assured and the association fixes the time when the change shall take effect and specifies the act which shall effectuate such change, and the assured dies before that time arrives or that act could have been performed, a different question is presented.

In the case at bar, for the purpose of avoiding controversies as to when the rights of one beneficiary terminate and those of the other begin the contract provides: "No change in the designation of beneficiary or beneficiaries shall be effective until the old certificate shall have been delivered to the head clerk and a new certificate issued during the lifetime of the member, and until such time the old certificate shall remain in force. \* \* \* No change in the designation of the beneficiary shall be of binding force unless made in compliance with this section." The contract also provides that, "in case a benefit

certificate is lost, destroyed, or beyond the member's control," he may waive all rights thereunder and designate another beneficiary without surrendering such certificate; but further provides that, in such an event, "no change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force."

In the instrument by which the assured attempted to designate his daughter as beneficiary he states: "I declare and agree that said certificate shall become and be null and void from the date the new certificate, hereby applied for, shall be issued by the head clerk, if such new certificate shall be issued during my lifetime."

By the terms of this contract and by the designation made by John Hyland, it is expressly provided that no change of beneficiary shall be effective, unless a new certificate shall issue in his lifetime, and that the change shall not take effect until such new certificate shall have been issued. Whether, if the precedent conditions had been complied with, so that the association might have issued the new certificate within the lifetime of the insured but had failed to do so, effect would be given to the change under the equitable rule that the court will consider that as done which ought to have been done, we need not determine, for no diligence would have enabled the association to have issued the new certificate within the lifetime of John Hyland.

Such provisions in the by-laws have already been considered and construed by the courts. In *Stemler v. Stemler*, (S. D.) 141 N. W. 780, the request for a change in beneficiary was delivered to the local clerk who mailed it to the head clerk on the same day. The assured died on that day. Two days later the head clerk received the request and issued a new certificate before he knew of the death. In considering the identical by-law now in question the court say: "There was no delivery of the old certificate to the head clerk or issuance of a new one during the lifetime of the insured member, and the certificate was therefore in full force and effect at the time of the death of the said insured, and the right of the plaintiff to the proceeds of said original benefit certificate, immediately upon such death, became vested in plaintiff, and it was thereafter beyond the power of

the Modern Woodmen to change or effect such vested right of plaintiff by the revocation of the old and issuance of a new certificate in which defendant was designated as beneficiary."

In *Kemper v. Modern Woodmen*, 70 Kan. 119, 78 Pac. 452, the request for a change in beneficiary was mailed to the head clerk February 13, and was received by him February 16. The assured died February 15. The by-law as it then existed provided that the change should not be effective until the delivery of the new certificate. The court say: "It was competent for the assured to contract with the society of which he was a member that no change in his certificate respecting the beneficiary should take effect until the new certificate should be delivered to him. He did so agree, and we are merely upholding the stipulations in his contract when we decide that there can be no recovery against the society on a certificate never delivered. One party to a contract cannot annul its conditions without the consent of the other. As held in the case last quoted from (*Coyne v. Bowe*, 23 App. Div. 261, 48 N. Y. Supp. 937) the contract ought to be sanctioned, as it makes certain who the beneficiary is and prevents complications and difficulties arising in determining the rights of conflicting claimants. This was the undoubted purpose in making the by-law under consideration."

In *Counsman v. Modern Woodmen*, 69 Neb. 710, 96 N. W. 672, 98 N. W. 414, the assured died after the request for a change in beneficiary had been delivered to the clerk of the local camp and before it had been received by the head clerk. The court say: "It would seem that the death of the assured, Counsman, before the presentation even of this requirement for a change of beneficiaries, which was refused when presented because of its noncompliance with the by-laws of the association, effectually prevented his desire in this respect from taking effect, and caused the right to the fund to vest upon his death, *eo instanti*, in the beneficiary named in the certificate, which the by-laws provided should be still in force."

To the same effect are *Knights of Honor v. Nairn*, 60 Mich. 44, 26 N. W. 826; and *Coyne v. Bowe*, 23 App. Div. 261, 48 N. Y. Supp. 937, affirmed in 161 N. Y. 633, 57 N. E. 1107. The case of *Hender-*



son v. Modern Woodmen, 163 Mo. App. 186, 146 S. W. 102, recognized the same rule but held that it had been waived in that case.

Under the contract between John Hyland and the association, the old certificate remained in full force and effect, unless a new one were issued within his lifetime. The request for the new certificate was not presented in time to reach the head clerk before his death. At his death the plaintiff was still the beneficiary and her right to the proceeds of the certificate then vested. The ruling of the trial court was correct and the order appealed from is affirmed.

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ONOFRIO MARFIA v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

February 6, 1914.

Nos. 18,335—(217).

**Negligence — evidence — verdict not excessive.**

1. Action, based upon the laws of Wisconsin, to recover for personal injuries. *Held* that the questions as to negligence and contributory negligence were properly submitted to the jury and that the evidence sustains the verdict. Also that the verdict is not so excessive, in view of the facts of the case, as to justify this court in interfering therewith.

**Physician — testimony within the statutory privilege.**

2. The testimony of a physician as to the instructions given his patient and as to whether the patient obeyed such instructions is within the privilege conferred by section 8375, G. S. 1913, and was properly excluded.

**Waiver of privilege by patient.**

3. The patient does not waive his privilege by bringing an action to recover for the injuries for which the physician treated him, unless the action

<sup>1</sup> Reported in 145 N. W. 385.

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Note.—On the question of the waiver of statutory provisions as to confidential disclosures to physicians, see note in 1 L.R.A.(N.S.) 1068. And as to the right of plaintiff in action for malpractice to avail himself of privilege as against testimony of defendant or other physicians, see note in 20 L.R.A.(N.S.) 1003.

be against the physician for malpractice. Neither does he waive such privilege by presenting evidence in support of his claim, where such evidence is confined to matters outside his transactions with the physician.

Action in the district court for St. Louis county to recover \$15,000 for injury received in Wisconsin while employed by defendant as a section hand. The complaint set out the provisions of chapter 254 of the laws of Wisconsin for the year 1907 and of chapter 485 of the laws for 1911. The answer denied that plaintiff's injury was caused by any negligence of any kind on its part, and alleged that plaintiff was familiar with all the dangers of his employment, entered upon it and continued therein with full knowledge thereof, and assumed all the risks and dangers of the employment. The case was tried before Ensign, J., and a jury which returned a verdict of \$5,000 in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Baldwin & Baldwin*, for appellant.

*Henry F. Greene*, for respondent.

TAYLOR, C.

Plaintiff brought suit for personal injuries and recovered a verdict. Defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial and appealed from the order denying the motion.

The accident occurred on the evening of June 26, 1912, at defendant's ice house in the city of West Superior, Wisconsin; and the action is based upon the statutes of the state of Wisconsin.

Plaintiff and several other employees of defendant were engaged in taking ice from the ice house and loading it upon cars. They made use of a chute which reached from the floor of the ice house to a platform outside. Plaintiff pulled the cakes of ice to the foot of the chute, then placed a pair of ice tongs in position, and the other employees drew the ice up the chute to the platform by means of a rope attached to the tongs. While plaintiff was placing a cake of ice in position at the foot of the chute, another cake which was

being drawn up the chute to the platform, slipped from the tongs, slid back down the chute, and plaintiff's leg was caught between the two cakes and broken.

1. The negligence charged was the failure to light the ice house and the furnishing of a pair of tongs for use in hoisting the ice which were defective and unfit for that purpose. The ice house was unlighted. There is testimony tending to show that, at the time of the accident, the darkness was such that plaintiff could not see the cakes of ice while upon the upper part of the chute, and was unable to determine whether they were properly landed upon the platform. There is also testimony tending to show that the points of the tongs had become so worn, rounded and dull that they did not fasten upon the ice properly, and that plaintiff had notified the foreman of this defect. Plaintiff claims that by reason of this defect the tongs slipped from the ice, and, on account of the darkness, that he did not discover that fact in time to avoid the injury. Defendant claims that plaintiff was familiar with the situation and with the condition of the tongs, and that the injury resulted from his own carelessness in unnecessarily putting himself in a place of danger at the foot of the chute.

The Wisconsin law provides that if the company and the employee were both negligent, but the negligence of the company was greater than that of the employee and contributed in a greater degree to the injury, the employee is entitled to recover. The questions as to the negligence of defendant, as to the contributory negligence of plaintiff, and as to the comparative negligence of plaintiff and defendant, were correctly submitted to the jury, and their conclusion upon these questions is amply supported by the evidence.

2. The broken ends of the bones of plaintiff's leg had slipped out of place and overlapped before uniting so that the leg is  $1\frac{1}{4}$  inches shorter than formerly. Defendant sought to show that plaintiff himself displaced these bones by his own improper acts, and for this purpose attempted to prove by the attending physicians that he had failed to heed or follow the instructions which they had given him as to the care and treatment of the injured limb. This testimony was excluded as infringing the privilege conferred by the statute which provides that: "A licensed physician or surgeon shall not.

without the consent of his patient, be allowed to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 8375, G. S. 1913.

Defendant contends that instructions given the patient and his attitude and conduct as to obeying them are not within the inhibition of the statute; that the information sought was not communicated in confidence; and that plaintiff had waived his privilege, and for these reasons insists that the exclusion of the testimony of the physicians was error. We think the ruling was correct. Although a physician may testify to the fact that he has attended a person professionally, the statute seals his lips as to all information acquired in consequence of his professional employment, and necessary for the proper performance of his professional duties. *Price v. Standard Life & Accident Ins. Co.* 90 Minn. 264, 95 N. W. 1118. His instructions are given in the performance of professional duties, and knowledge of the manner in which they are observed might have an important bearing upon his subsequent treatment. The statutes of different states vary materially and the statutory privilege is sometimes restricted to communications made by the patient. It is obvious that decisions based upon statutes essentially different from our own are not in point. Our statute does not limit the privilege to communications made by the patient, nor to information imparted in confidence; but extends it to all information acquired by the physician in his professional capacity and necessary to enable him to act properly.

Defendant bases its claim that plaintiff had waived his privilege upon the ground that he brought suit to recover for the injuries for which the doctors had treated him; that he himself had testified as to these injuries; and that he had called other physicians to testify as to the consequences resulting from these injuries.

The authorities hold that the bringing of an action, unless it be against the physician himself for malpractice, is not a waiver of the privilege. The testimony of the physicians called as witnesses by plaintiff was confined to the information acquired by their own examination made shortly before the trial and after the leg had healed. Plaintiff himself testified concerning the manner in which the injury

occurred and his present condition in consequence thereof. Neither plaintiff nor the physicians called by him testified as to the matters which defendant sought to elicit from the attending physicians. The cases cited by defendant are essentially different from the instant case in their facts. The bringing of the action and the presentation of the testimony adduced by plaintiff did not operate as a waiver of the privilege. *Hilary v. Minneapolis Street Ry. Co.* 104 Minn. 432, 116 N. W. 933; *McAllister v. St. Paul City Ry. Co.* 105 Minn. 1, 116 N. W. 917.

In support of its proposition as to waiver defendant relies largely upon *Wigmore on Evidence*. This erudite author discusses the underlying principles which govern such matters, and, in his usual trenchant style, asserts that the law ought to be substantially as contended for by defendant, but frankly admits that such is not the law at the present time. We give much weight to his masterly work, but must apply the law as we find it and leave the modification of the statute to the law-making power. As said in *Hilary v. Minneapolis Street Ry. Co.* supra: "Mr. Wigmore gives some excellent reasons why the statute might be modified. *Wigmore, Ev.* §§ 2380-2389. But the statute has been of long standing, has generally been liberally construed, and, although there seem to be strong reasons why it might be modified so as to permit physicians to testify upon such occasions as this, the wisdom of making a change should be left to the legislature."

3. Defendant urges that the verdict is excessive. Plaintiff is a young man 29 years of age dependent upon manual labor for support. His leg is shortened  $1\frac{1}{4}$  inches. The evidence tends to show that the bones are not in alignment but are turned from their normal position, and that the leg will always remain weak for this reason. Also that the condition of the leg is such that using it is likely to cause pain at intermittent periods as long as he may live. The verdict is for \$5,000. The amount is large, but it was fixed by the jury and has been approved by the trial court, and we think that the facts are such that this court is not justified in interfering with their conclusion.

We find no prejudicial error in the record and the order appealed from is affirmed.

STATE v. CATHERINE A. BURNES.<sup>1</sup>

February 6, 1914.

Nos. 18,354—(6).

**Sidewalk assessment — due process of law — statute valid.**

1. Laws 1901, c. 167, providing that a village council may on its own motion order a sidewalk constructed, is not unconstitutional because it does not give property owners an opportunity to be heard as to the propriety or necessity of the proposed improvement. The opportunities which the property owner has to be heard when the assessment is fixed, and on the application for judgment, satisfy the due process of law requirement.

**Evidence — assessment per front foot.**

2. It does not appear that the village council did not ascertain or determine the amount of benefits to defendant's property. An assessment of abutting property on the basis of frontage is not illegal in an improvement of this character.

**Postponement not abandonment.**

3. The council had the right to postpone the construction of the sidewalk from October, 1909, until the first of May following. Such postponement was not an abandonment of the work, and it was not necessary to give property owners another opportunity to build the walk themselves.

In the matter of proceedings in the district court for Hennepin county to enforce payment of taxes assessed for the year 1910, delinquent in January, 1912, Catherine A. Burnes filed her answer, objecting to a special assessment of \$62.54 for a certain sidewalk in front of her property described in the proceedings. The substance of defendant's objections will be found in the opinion. The matter was submitted upon stipulated facts to Hale, J., who made findings and ordered judgment in favor of plaintiff for the full amount of

<sup>1</sup> Reported in 145 N. W. 377.

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Note.—The authorities on the general question of assessments for improvements by the front-foot rule are collated in an extensive note in 28 L.R.A.(N.S.) 1124.

taxes and penalties claimed. From the judgment entered pursuant to the order, defendant appealed. Affirmed.

*George S. Grimes and Gordon Grimes*, for appellant.

*James Robertson*, County Attorney, and *R. S. Wiggin*, Assistant County Attorney, for respondent.

BUNN, J.

Defendant is the owner of real estate having a frontage on the south side of Excelsior avenue in the village of West Minneapolis in Hennepin county. On August 3, 1909, the village council on its own motion passed a resolution ordering a sidewalk to be constructed on the south side of Excelsior avenue. The resolution was published and served according to law on the property owners, including defendant. On October 5, 1909, the chief of police of the village made and filed his certificate to the effect that no part of the sidewalk had been constructed, except certain portions in front of the property of two owners. On the same day the council passed a resolution for the letting of the construction of the sidewalk by contract, and providing that advertisements for bids should be made about the first of May following, there not being sufficient funds then in the village treasury. On April 12, 1910, the council passed a resolution for the completion of the work. It was duly let by contract, and fully completed and approved June 29, 1910. On July 5, 1910, the council passed a resolution that on July 26 at 7:30 p. m., at the council chambers in the village, it would hear testimony of all persons interested or affected, and ascertain the amount of benefits to property fronting on the sidewalk. This resolution was served on all the property owners on or before July 14, as required by its terms. Defendant appeared personally and by attorney at this hearing, which was held at the time and place appointed. On July 28, to which date the meeting was adjourned, a resolution was passed which determined the benefits to abutting property as the actual cost of the work. The minutes of the meeting recite: "Benefits of Excelsior avenue sidewalk was determined at the actual cost to the abutting property."

The assessments for the sidewalk were entered by the county audi-

tor against the abutting property. This proceeding was to recover judgment against defendant's land for the taxes for 1910, which included the sum of \$62.54, the amount of the 1910 instalment of the sidewalk assessment. The issues were tried by the court, and a decision rendered granting judgment for the entire delinquent taxes including the sidewalk assessment. Judgment was entered on the decision and defendant appealed.

1. Defendant contends that the law under which the council ordered the sidewalk to be constructed and assessed the tax in question is unconstitutional as depriving defendant of her property without due process of law. The claim is based upon the proposition that property owners are entitled to be heard as to the propriety or necessity of the proposed improvement. The law in question is chapter 167, page 215, Laws 1901, and clearly authorizes the village council of any village incorporated under the laws of this state to construct sidewalks on their own motion whenever they shall deem it necessary or expedient to do so. The resolution is required to specify the place or places where the sidewalk is to be built, the kind and quality of materials to be used, the size and manner of construction, the time in which the same shall be completed, and the names of the owners of all property fronting on the streets where the sidewalk is to be laid. By section 2 of the act, the resolution is required to be served personally on all such owners, and to be published. Section 3 provides for a hearing upon the assessment of benefits, after notice thereof given to the property owners.

That this act does not deprive the property owners of due process of law is settled in this state by the case of *County of Hennepin v. Bartleson*, 37 Minn. 343, 34 N. W. 222, in which the validity of a section of the Minneapolis charter authorizing the council to direct the construction of sidewalks whenever it should deem it necessary was upheld. Justice Vanderburgh said: "The legislature may direct local improvements of a public nature to be made, and the expense thereof to be levied upon the particular tax district indicated, without any intermediate proceedings to determine the necessity or propriety of the improvements, or the necessary cost or expense thereof. *Guilder v. Town of Otsego*, 20 Minn. 59 (74). In so doing, the legislature



exercises its own discretion. It may also delegate to a municipal corporation the right to make such local improvements and may authorize appropriate proceedings to ascertain the necessity and cost thereof, without notice to the taxpayers or property-holders interested." This decision is in line with the general rule in this state and elsewhere. *Rogers v. City of St. Paul*, 22 Minn. 494; *State v. District Court of Ramsey Co.* 33 Minn. 295, 23 N. W. 222; *Kelly v. Minneapolis City*, 57 Minn. 294, 59 N. W. 304, 26 L.R.A. 92, 47 Am. St. 605; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175; *Speer v. Mayor, etc., Athens*, 85 Ga. 49, 11 S. E. 802, 9 L.R.A. 402; *Pittsburg, C. C. & St. L. Ry. Co. v. Fish*, 158 Ind. 527, 63 N. E. 454. The property-owner has an opportunity to be heard when the assessment is fixed, and again on the application for judgment. This satisfies the due process of law requirement. 2 Dunnell, Minn. Dig. § 6879.

2. It is next urged that the village council never ascertained or determined the amount of benefits to defendant's property. This claim is founded on the fact that the minutes of the council simply recite that "Benefits of Excelsior avenue sidewalk was determined at the actual cost to the abutting property." This recital is not sufficient to show that the council did not legally ascertain and determine the benefits to defendant's property. Even conceding that this record is the only resolution of the council on the subject, it is fair to construe it as a determination that the assessment was made against the property benefited on the basis of frontage. This is not illegal in a case of this kind. *County of Hennepin v. Bartleson*, *supra*; *State v. District Court of Ramsey Co.* 80 Minn. 293, 83 N. W. 183. We hold that it is not shown that the council failed to ascertain or determine the amount of benefits, or that it proceeded upon an erroneous principle.

3. We do not sustain the contention that the council had no right to postpone the construction of the sidewalk until the following spring, without then giving the property owners another opportunity to construct it themselves. It is provided in section 3 of chapter 167, p. 217, Laws 1901, that, if such work shall not be fully done and the sidewalk fully completed within the time specified in the resolution, the council may order the same done by the street commis-

sioner, or by contract let to the lowest bidder. There is nothing in the act that requires the council to proceed to construct the walk immediately after the period of 40 days allowed to the property-owners has elapsed. Deferring action from October, 1909, to May, 1910, was within the power of the council, and did not amount to an abandonment of the work, nor was the council required to give the property owners another opportunity to do the work themselves. Judgment affirmed.

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**EMIL MUNCH and Others v. JAMES E. McGRATH.<sup>1</sup>**

February 6, 1914.

Nos. 18,382—(215).

**Lease of dam — recovery from lessee of damages to landowners.**

A lease by plaintiffs to defendant of a dam required the lessee to repair the dam and to keep it in repair and to pay a fixed annual rental for its use. Under the facts in the case it is *held* that the lease contemplated the use of the dam for the purpose of floating logs down the stream to the dam, and for no other purpose; that the lease was an assertion of the right of the lessor to lease the dam for that purpose and of the lessee to use it for that purpose; that a provision in the lease that the lessees should use the dam in a lawful manner and not do or suffer anything unlawful to be done in and about the demised premises, or in the use thereof, was not intended to forbid this contemplated use; and that the lessors, having been compelled to pay damages to landowners on account of flooding caused by this use, cannot recover from the lessee the whole or any part of the amount so paid.

Action in the district court for Washington county to recover \$3,469, the amount of judgments recovered against plaintiffs in actions against them by persons whose lands had been flooded by defendant's use of the dam rented by him from plaintiffs. The case was tried before Stolberg, J., who made findings that the action be dis-

<sup>1</sup> Reported in 145 N. W. 163.

missed and that defendant recover his costs and disbursements. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

*O'Brien, Young & Stone* and *Charles Bechhoefer*, for appellants.  
*J. N. Searles*, for respondent.

PER CURIAM.

For many years plaintiffs and their predecessors in title were the owners of the Chengwatonna dam, on the Snake river near Pine City. The dam was constructed with sluice-gates through which logs were driven over the dam, and it was used as a sluice-dam for many years, down to and including 1902, so long in fact that plaintiffs' ancestors and predecessors in title had acquired a prescriptive right to flow adjacent lands as an incident to the use of the dam for sluicing logs. *Swan v. Munch*, 65 Minn. 500, 67 N. W. 1022. In 1903 the dam was partly destroyed. Defendant owned standing timber adjacent to the Snake river above the dam and desired to build a sawmill at or near the dam. In the fall of 1903 he approached Emil Munch, one of the plaintiffs and the agent of the other plaintiffs, for the purpose of leasing the dam. His plan was to use the dam, not for the purpose of sluicing logs over the dam, but to float them down either to his mill or to a point from which he could ship them by rail. He made this purpose known to Munch. During the negotiation that followed, Munch represented to defendant that plaintiffs had the right to hold at least nine feet of water in the dam. Defendant stated that he should not want to maintain over seven feet of water. The banks of the stream were so low that the maintenance of the dam for any purpose caused an overflow upon the lands above the dam. At that time plaintiffs believed that they had acquired a prescriptive right to maintain the dam and overflow the land for any purpose for which the dam might be used. In this they were mistaken. Their prescriptive right was to overflow only for the purpose of maintaining the dam for the purpose of sluicing logs. *Simons v. Munch*, 115 Minn. 360, 132 N. W. 321.

On September 19, 1903, plaintiffs made a lease of the dam to defendant until September 21, 1906, with a provision for extension

to October 1, 1907, under certain conditions, without additional payment of rent. The lease provided for a rental of \$1.000 a year, provided as one of the considerations thereof that the lessee should repair the dam and restore it to the condition it was in prior to its destruction, and should keep the dam in a proper state of repair during the term of the lease. The lessee covenanted and agreed "that he will at all times use said dam in a lawful manner and will not do or suffer anything unlawful to be done in and about the demised premises or in the use thereof." It was further agreed "that if, during the term of this lease, the premises shall be in any manner injured, damaged, or destroyed, though \* \* \* without the fault of said second party, this lease shall nevertheless continue in force," and if "it becomes impossible to use the demised property for sluicage purposes or for any other purposes for which the same are adapted, and such condition is brought about without the fault of the lessee, yet this lease shall continue in full force and effect until the expiration of the term above set forth."

In March, 1904, this lease was surrendered by defendant, and another lease with similar terms was executed by plaintiffs to Joseph McGrath. This lease was assigned to defendant and he assumed its covenants, agreements and conditions.

On October 11, 1907, a third lease was executed, leasing the dam for another year on similar terms.

None of these leases contained any express covenant or condition as to the manner in which the dam should be used.

In 1904 defendant repaired the dam at his own expense, and during the term of the last two leases he used it to create a head of water not exceeding seven feet, in accordance with his plan previously disclosed to Munch. No logs were sluiced over or through the dam. The maintenance of the dam caused the lands of adjacent owners to be flooded. Adjacent owners brought action against both plaintiffs and defendant for substantial damages sustained by reason of flooding caused by maintaining this dam during the years 1905, 1906, 1907 and 1908. The parties suing recovered judgment against all parties. Plaintiffs under compulsion paid this judgment, amount-

ing to \$3,850.75, and commenced this action under Revised Laws 1905, section 4281, to recover the amount so paid.

The trial court found that defendant did not, as between the plaintiffs and defendant, make any unlawful use of said dam, but that the use made by defendant of the dam was lawful under the lease, and the court ordered judgment for the defendant, holding in effect that, as between them, the plaintiffs were primarily responsible for the damages sustained by landowners on account of the flooding of their lands.

A majority of the court are of the opinion that the view of the trial court is right; that the lease contemplated the use of the dam for the purpose of floating logs to the dam, and that such was the only use contemplated; that the lease, taken in connection with all the facts and circumstances, was an assertion of the right of plaintiffs to lease it for that purpose, and of the defendant lessee to so use it; that the provision in the various leases that the lessee should use the dam in a lawful manner, and not do or suffer anything unlawful to be done in and about the demised premises or in the use thereof, was not intended to forbid this contemplated use; and that plaintiffs are not entitled to recover from defendant either the whole or any part of the amount paid by them as damages caused by such use of the dam.

Order affirmed.

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## JOHN C. ZEITLER v. NATIONAL CASUALTY COMPANY.<sup>1</sup>

February 6, 1914.

Nos. 18,383—(238).

### Accident insurance — policy construed.

1. In an action upon an accident insurance policy the contract is construed and held to obligate defendant to make monthly payments of indemnity during the disability of the insured, not exceeding the period covered by the policy.

<sup>1</sup> Reported in 145 N. W. 395.

**Verdict sustained by evidence.**

2. The verdict of the jury to the effect that the disability for which plaintiff claims indemnity was the result of accidental injury, and that defendant waived strict compliance with the terms of the policy respecting notice and proof of injury, is sustained by the evidence.

**Waiver of notice — action not premature.**

3. Defendant being under obligation to make monthly payments of indemnity and having waived formal notice of the injury or proof of disability, it is *held* that the action was not prematurely brought, notwithstanding a provision of the policy that no action could be commenced thereon until after the proofs had been furnished.

**Charge to jury.**

4. The record presents no reversible error either in the instructions or refusals to instruct the jury.

Action in the district court for Washington county to recover \$475 upon defendant's policy of accident insurance. The answer alleged, among other matters, that if plaintiff was totally disabled such disability had been caused by and was the result of locomotor ataxia; that locomotor ataxia is a form of paralysis and a chronic disability and the alleged disability of plaintiff was not the result of accident. It further alleged that if plaintiff's alleged disability was the result of accidental disability there was no external or visible mark of such injury on his body, and if any such injury was sustained it was caused and contributed to by disease or chronic ailment; that in his application plaintiff represented and warranted that he was at the time of making it in sound and healthy condition physically and that such representation was false. The case was tried before Stolberg, J., who denied defendant's motion to dismiss the action and denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$494.75 in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Einar Hoidale, H. L. Hoidale and Henry C. Walters, for appellant.*

*H. H. Gillen, for respondent.*

BROWN, C. J.

Action upon an accident insurance policy in which plaintiff had a verdict and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts will be stated in connection with the questions decided. It is contended by appellant: (1) That no cause of action had accrued on the policy at the time the action was commenced and that it was prematurely brought; (2) that the disability of which plaintiff complains was the result of illness and not of accident, and that his recovery should be limited accordingly; (3) that the evidence wholly fails to show an accidental injury; (4) that the plaintiff failed to comply with the terms of the policy respecting the notices required thereby to be given defendant, and in other respects; and (5) that the court erred in certain rulings and instructions and refusals to instruct the jury. We dispose of these contentions in the order stated.

1. Plaintiff made application to defendant, an accident or casualty insurance company, for insurance against accident or illness, and a policy was duly issued and delivered to him. The policy provided that, in consideration of the premiums paid and to be paid, the company

“Does hereby insure the person described in said application, subject to the provisions and conditions herein contained and indorsed hereon, from 12 o'clock noon, standard time, of the day this contract is dated, until 12 o'clock noon, standard time, of the first day of August, 1909, and for such further monthly periods, stated in the renewal receipts, as the payment of the premium specified in said application will maintain this policy and insurance in force.”

This is followed by various separate provisions in specifications of the scope of the insurance, and the rate of indemnity to be paid, and, among others:

“Accident Indemnity for Total Disability.

“Paragraph A. At the rate of twenty-five dollars per month against total loss of time, not exceeding twenty-four consecutive months, resulting from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, and which immediately, continuously and wholly, from date of accident,

disable and prevent the assured from performing every duty pertaining to any business or occupation."

Plaintiff claims to have received an accidental injury totally disabling him from work, and he brought this action to recover the promised indemnity, insisting that he was entitled to recover under the contract the sum of \$25 per month during his disability, not exceeding 24 months, the period covered by the policy. Defendant contends that no liability arises under the contract, and that no action thereon can be brought until after the disability has terminated, or the period covered by the policy has expired. In other words, the company contends that it is under no obligation under the contract to make monthly payments of indemnity, and that the true construction of the terms of the policy imposes upon it an obligation to pay a total sum at the termination of disability or expiration of the policy. This contention presents the important question in the case. We do not sustain it.

Defendant is an accident or casualty insurance company, and as such was applied to by plaintiff, a shoemaker and cobbler, for indemnity against loss from accidental causes, and a policy so purporting to indemnify him was issued. The single purpose of the contract, as respects this indemnity, was to provide plaintiff with means of support during the period of possible disability arising from accidental means, supplying thereby the pecuniary loss necessarily resulting from his inability to pursue his occupation. The application for the policy recited, "the occupation and duties as stated above call for the following classification and indemnities:

Class E

Monthly Acc'd.

Ind. \$25

and the policy, as shown by the above quotations, provides for "indemnity at the rate of twenty-five dollars per month." This language is plain and unambiguous and was clearly intended to convey to plaintiff the understanding that the indemnity promised would be paid to him, in case of disability, in monthly instalments. And if there were no other provisions upon the subject the contract could not otherwise be construed, for as thus expressed the language clearly discloses the intention of the parties, and leaves no room for any other



construction. The only doubt thrown upon the question is found in paragraph V of the policy, which provides as follows:

**"Notice and Proofs.**

"Paragraph V. Written notice of any injury, fatal or nonfatal, or of any illness, must be given to the company at Detroit, Michigan, within twenty days from the date of accident or beginning of illness unless such notice may be shown not to have been reasonably possible. \* \* \*

"Affirmative proof of any injury, fatal or nonfatal, or of any illness, must be furnished to the company at Detroit, Michigan, on such blanks as the company provides, within one month from the date of death, loss of limb or of sight, *or of the termination of disability.* Provided, that such affirmative proof as to injury must establish the fact that such injury was caused solely and directly by external violent and accidental means. *No action at law or in equity shall be brought against this company until three months from the expiration of the time named herein for filing proofs,* nor shall the same be brought unless commenced within one year after right of action accrues in accordance with this paragraph. \* \* \*

The precise contention of defendant is that no right of action accrues on the policy until the "affirmative proof" has been made, and that such proof, as applied to this case, cannot, under the conditions of the policy quoted, be made until after "the termination of disability," or the expiration of the period covered by the policy if the disability so continues. We think the policy should not be so construed. To give the provisions quoted this effect would defeat the main object of the contract, and substantially take away the beneficial purpose thereof, namely, the temporary pecuniary relief of the policyholder during his disability. For, if the "affirmative proof" be essential to the right of the promised indemnity, and it cannot be given until the insured has recovered, the whole intent of the contract as one of indemnity pending illness or disability is nullified and destroyed. The policyholder, though unable to pursue his occupation for months, must continue the payment of premiums to keep his policy in force and patiently await his recovery before he can claim the relief the contract clearly intended he should have in lieu

of the earnings of which his disability deprives him. And though the question is not entirely free from doubt, we think that the provisions limiting the time within which the "affirmative proof" may be furnished might well be construed as fixing a time beyond which they may not be made. The language of the policy is of defendant's own choosing, and the confusion created thereby, and the apparent conflict in the different provisions, must be resolved against it to the end that the true intent of the parties may be given effect. The rule for the construction of such contracts, where ambiguous and uncertain, is most strongly against the company and favorable to the insured. *Mareck v. Mutual R. F. Life Assn.* 62 Minn. 39, 64 N. W. 68, 54 Am. St. 613; *Geare v. U. S. Life Ins. Co.* 66 Minn. 91, 68 N. W. 731; *Reilly v. Chicago Guaranty Fund Life Society*, 75 Minn. 377, 77 N. W. 982. The insured in this case was an ordinary shoemaker and cobbler, and no doubt incapable of analyzing the contract any further than to discover that which is most apparent, namely, the promise of monthly indemnity during disability, and the company should not be heard to insist that the ambiguity created by the "affirmative proof" clause, or the limitation of the time when an action might be brought, should be resolved in its favor to the detriment of the insured. *McCarvel v. Phenix Ins. Co. of Brooklyn*, 64 Minn. 193, 66 N. W. 367; *Davis Shoe Co. v. Kittanning Ins. Co.* 138 Pa. St. 73, 20 Atl. 838, 21 Am. St. 904. The suggestion is made that this construction would result in a multiplicity of actions, and since the contract covers a period of 24 months, involve defendant in 24 lawsuits. The suggestion is without force. A suit could be avoided by a prompt payment of the indemnity. And if a controversy should arise, as in the case at bar, upon the question whether the disability complained of was the result of an accident within the meaning of the policy, one action would finally determine the issue, and the result thereof would be *res judicata* as to both parties. If the question be resolved against the company, it would have no alternative but to make the payments called for by the contract, and the only possible question subsequently to arise would be whether the disability had been removed by recovery. We therefore hold that the contract obligated the defendant to make monthly payments of

indemnity to plaintiff, and that a right of action therefor accrued at the expiration of each month during the period covered by the policy, provided the necessary notices and proof were given as required by the policy, or waived by the company.

2. The second contention is that the evidence wholly fails to show an accidental injury, and, therefore, that plaintiff can recover only under the provisions of the policy in respect to indemnity for illness. This claim is not sustained. The evidence made the issue one of fact, and we discover no reason for disturbing the verdict. Plaintiff, at the time of his injury, was working at his cobbler's bench. Some person came into the shop and requested the right to use his telephone. He arose from the bench to get the telephone directory for the purpose of finding the number of the call required, and tripped or fell over an iron anvil upon which shoes or boots were placed when the soles thereof were pegged, or his apron caught in that instrumentality, and he fell headlong upon the floor, injuring his arm, face and head. He raised himself from the floor, and subsequently resumed his work, but soon after was compelled to go to his home, and since has been unable to follow his occupation. The immediate result of his fall was partial paralysis, from which he has not recovered. Though some items of the evidence upon the subject may be said to leave the cause of plaintiff's fall in some doubt, taking the testimony as a whole it seems quite clear that plaintiff was in some way tripped by either his foot or apron coming in contact with the projecting anvil, and that he was thus thrown to the floor. There is no evidence that plaintiff at this time was suffering from any illness, or that he had so suffered, or was afflicted with a disease of any kind, and the jury were fully justified in concluding that his present condition was the result of an accident. *Ludwig v. Preferred Accident Ins. Co.* 113 Minn. 510, 130 N. W. 5; 2 Dunnell, Minn. Dig. § 4874.

3. The further point is made that plaintiff failed to comply with the terms of the policy requiring notice of the accident to be served upon the company. It will be noted by the provisions of the policy, heretofore quoted, that two notices are required to be given: (1) The written notice of the happening of the accident or illness; and (2) the "affirmative proof" heretofore referred to. In addition to

these the policy further provides for periodical certificates from the attending physician of the condition of the insured, and the probable duration of his illness or disability. And the right to examine the insured subsequent to his injury, or illness, for the purpose of learning the character of the injury or nature of the illness, is by the policy expressly reserved to the company, a refusal to permit which, by the insured, forfeits all claims to indemnity. Written notice of the accident was given the company, though perhaps not within the time fixed by the contract, and subsequently certificates of the condition of the plaintiff were furnished by his attending physician, but these were not continued every 30 days as the policy provides. The "affirmative proof" was not furnished at all, the failure to do which plaintiff claims was due to the act of defendant in refusing to furnish the necessary blank. But this is not of serious importance. It is the contention of defendant that the failure of plaintiff to comply with the contract in respect to furnishing these notices and the certificates of the attending physician, forfeits all rights under the policy. To avoid the effect of this failure, which is conceded, plaintiff insists that by its acts and conduct in the matter the company waived the default in this respect. The trial court submitted the issue to the jury, and the question presented is whether the verdict affirming such waiver is sustained by the evidence. We hold that the evidence sufficiently supports the verdict. Plaintiff was injured in September, 1911, written notice of which was given. On October 14, 1911, the company wrote him calling attention to the failure to comply with the terms of the policy in respect to notice, and certificates of his condition, and requesting further information, and stating that if the company did not hear from him within 10 days it would treat the matter as though no claim was to be presented. In response to this plaintiff's physician wrote the company, stating among other things that proper blanks had not been furnished for the character of proof the contract called for, and further detailed the nature and character of plaintiff's injury. On November 13, defendant wrote plaintiff's physician that in its opinion plaintiff's condition should be treated as an illness, and blanks for proof of such were inclosed. These were not filled out or returned, plaintiff and his physician con-

tending that the injury was the result of accident, and was not an illness within the meaning of the policy. Here the matter seems to have rested until September 4, 1912, when the company again wrote plaintiff's physician still insisting that plaintiff was suffering from illness and not accident, and calling for further information. In response plaintiff's physician stated again that the injury of plaintiff was the result of an accident, and he advised the company that in his opinion it was doubtful whether he would recover therefrom. Thereafter the company, in exercise of the right reserved to it by the policy, caused an examination of plaintiff to be made by its own physician who diagnosed his ailment as a "moderately advanced case of locomotor ataxia," in no way attributable to the accident of which plaintiff complains. The company refused to recognize an accidental injury and this action followed. On the facts stated it seems clear that there was a waiver of the default of plaintiff strictly to comply with the conditions of the policy on the subject of notice of the accident. The first notice sent to the company, together with the correspondence stated, fully advised the company of every fact necessary or essential to the protection of its rights, and, instead of standing upon the plaintiff's default, the company continued the negotiations in an effort to lessen its liability on the theory that plaintiff was suffering from an illness and not from an accidental injury. The "affirmative proof," which was not furnished, would have communicated to defendant no additional information, and it was in no way prejudiced by the failure of plaintiff to furnish it. That there was a waiver seems clear; at least the question was properly submitted to the jury. *Mee v. Bankers' Life Assn. of Minn.* 69 Minn. 210, 72 N. W. 74; *Mueller v. Grand Grove U. A. O. D.* 69 Minn. 236, 72 N. W. 48; 2 *Dunnell*, Minn. Dig. § 4789; *Peabody v. Fraternal Acc. Assn.* 89 Me. 96, 35 Atl. 1020; *Standard Life & Accident Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856. That there may be a waiver in such cases, notwithstanding the statutory form of policy, was held in *Lake Superior P. & C. S. Co. v. Concordia Fire Ins. Co.* 95 Minn. 492, 104 N. W. 560.

The notices having been waived by defendant and liability denied, the provisions limiting the time within which an action might be

brought were also waived, and the contention that an action could not be commenced until after the "affirmative proof" had been submitted falls with such waiver. Upon the facts presented to it by the notice given by plaintiff, and those learned from its own voluntary investigation, defendant denied liability and is in no position to urge in defense that the notices were not given strictly in conformity with the terms of the policy. *Hand v. National Livestock Ins. Co.* 57 Minn. 519, 59 N. W. 538; 3 Notes to Minn. Cases, 1170; *French v. Fidelity & Casualty Co.* 135 Wis. 259, 115 N. W. 869, 17 L.R.A. (N.S.) 1044. For the reasons there stated, *La Plant v. Firemen's Ins. Co. of Baltimore*, 68 Minn. 82, 70 N. W. 856, is not in point.

4. The other questions do not require discussion. We have fully considered all alleged errors in the admission and exclusion of evidence and in the instructions of the court, and the refusal of defendant's requests, and find no error of a character justifying a new trial. Order affirmed.

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JAMES LEWIS v. CHICAGO GREAT WESTERN RAILROAD COMPANY.<sup>1</sup>

February 6, 1914.

Nos. 18,385—(246).

**Verdict not sustained by evidence.**

Evidence in an action by a railroad brakeman to recover damages for injuries received from being caught between the engine-tender and the end of certain poles projecting from a car which he had just uncoupled, or was uncoupling, *held* insufficient to sustain a verdict in his favor, in that thereunder it was merely conjectural whether the accident was due to some movement of the engine, which would have involved liability on defendant's part, or from the settling of the poles or cars, which would not.

Action in the district court for Ramsey county to recover \$25,000 for injury received while in the employ of defendant. The answer

<sup>1</sup> Reported in 145 N. W. 393.

alleged that whatever injuries plaintiff received were caused by his own negligent failure to exercise proper care for his own safety, and his negligence directly contributed to the accident. It further alleged that plaintiff knew and appreciated whatever dangers or hazards were involved in the situation and assumed the risks of whatever dangers were involved in his employment. The case was tried before Catlin, J., who at the close of plaintiff's testimony denied defendant's motion to dismiss the action, and at the close of all the testimony defendant's motion for a directed verdict in its favor, and a jury which returned a verdict of \$8,750 in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

*Briggs, Thygeson & Everall*, for appellant.

*Barton & Kay*, for respondent.

PHILIP E. BROWN, J.

Defendant appeals from an order denying its alternative motion for judgment or new trial, after verdict for plaintiff returned in an action to recover damages for personal injuries.

There is little dispute on the facts, and none as to the following: On November 26, 1912, and previously, plaintiff was a freight brakeman in defendant's employment, his run being between Austin and Hayfield, in this state. A flat car loaded with poles had remained on defendant's side track in Austin for several days prior to the date stated. Its load had shifted forward, so that some of the poles projected over one end. Plaintiff was familiar with this car and the condition of its load. In the evening of the day mentioned, pursuant to his duties, he coupled the car into a train, next to the engine. In order to do this, and to connect the airhose, he had to get under the ends of the poles. Later the train, including this car in the position stated, was moved out, plaintiff accompanying it, and arrived at Mayville, the next station, about 10 o'clock p. m., the night being very dark. When the train arrived there, two cars were standing on the side track. Pursuant to orders, plaintiff cut out the pole-car from the train by uncoupling and disconnecting the air at the rear

end. The engine and car then moved forward, plaintiff accompanying them, and backed slowly in on the siding, until the car came in contact with the forward car already there. Plaintiff gave the engineer a stop signal, who thereupon applied the air and brought the engine and car to a stop, and plaintiff, for the purpose of leaving the car on the siding, stepped in between it and the tender, turned the angle-cocks, and disconnected the air; whereupon his head was caught between the tender and projecting poles, thus occasioning the injuries complained of.

1. The complaint charged negligence in the condition of the poles, and also that defendant moved the engine and car, shoving them closer together, while plaintiff was in the position stated, thus causing the accident; but the court submitted the latter ground only. The sufficiency of the evidence to sustain the verdict being challenged, a somewhat fuller statement thereof relating to the occurrence is necessitated.

The side-track was level at the place of the accident. The engine and car were equipped with air-brakes, and to accomplish the switching movement the engineer started the engine in backward motion, then shut off the steam and "drifted in," using the air for control; the speed, when backing, being three or four miles an hour, and there being but slight jar when the cars came together. The stop was made by applying the air brakes on engine and car, the engine remaining set for further backward movement, wherefore if any motion thereafter occurred it would have been towards the car. The effect of the setting of the brakes, however, was to hold the engine and car steady and leave them standing where they stopped, and the engineer contemplated that the next movement after detaching the car would be forward. An invariable rule required the setting of brakes on cars left on sidings. At the time of the accident, the rear brakeman was near the rear end of the car, but was not called as a witness. Plaintiff testified, at folio 47 of the paper book, that the train movement coupled the car to the other two, and there was no testimony to the contrary. No witness testified to seeing the accident, or to any movement of the engine, cars, or poles after the stop. It seems probable that plaintiff's injury could have resulted from either, and all other



causes are apparently eliminated. Plaintiff's case rests upon the theory that the engine moved, and claims such was established by the circumstances disclosed; while defendant argues to the contrary, claiming also that the accident probably resulted from a slack movement of the cars occurring after plaintiff went between the car and tender, or else from some shifting of the poles, or, in any event, that the cause was left to mere conjecture. The engineer testified positively that the engine remained stationary after the stop. Plaintiff's version in this connection was that "by some unknown movement" his head was caught between a pole and the back of the tank, thus held from 15 to 20 seconds, and then released; doubtless meaning, by the expression quoted, nothing more than that he did not know the cause. Aside from medical experts, these two were the only witnesses sworn.

The applicable law has frequently been declared by this court, as follows: Causal connection between the negligence claimed and the injury need not be proved by direct evidence, but the proofs must be something more than merely consistent with plaintiff's theory of how the accident occurred. "If the circumstantial evidence in any case furnishes a reasonable basis for the inference by the jury of the ultimate fact that the alleged negligence was the cause of the injury complained of, it is sufficient proof of a causal connection to support the verdict;" while, on the other hand, if the question of negligence in the premises is left conjectural, no recovery can be had. *Moore v. Northern Pac. Ry. Co.* 108 Minn. 100, 121 N. W. 392; *Healy v. Hoy*, 115 Minn. 321, 132 N. W. 208; *La Pray v. Lavis Chemical Co.* 117 Minn. 152, 134 N. W. 313; *Murphy v. Twin City Taxicab Co.* 122 Minn. 363, 142 N. W. 716. And the latter result likewise follows where more than one possible cause is shown, any one of which might have produced the harm, but there are no circumstances pointing to the one which would involve liability on defendant's part as the probable cause, more than to the other or others which would not. *Owens v. Chicago Great Western R. Co.* 113 Minn. 49, 52, 125 N. W. 1011. The question then, is: Does the evidence, direct and circumstantial, furnish a reasonable basis for the deduction that a movement of the locomotive caused the injury? Several considerations preclude an affirmative answer. The initial one lying in the

positive and uncontradicted testimony of the engineer, which, not being so inconsistent with the facts and circumstances disclosed or otherwise so inherently improbable as to impeach or discredit the witness, cannot arbitrarily be disregarded. *Campbell v. Canadian Northern Ry. Co.* supra, page 245, 144 N. W. 772, and cases there cited. The only inconsistency, if such it may be called, disclosed in his testimony lies in his statement that the cars were coupled in the switching movement, and his subsequent admission that from his position and on account of the darkness he could not have known such to be the fact. However, plaintiff himself so testified, evidently not from observation, but because this was the usual result of like movements. The engineer's truthfulness, moreover, is reinforced by the fact that any backward movement of the locomotive, without a signal from plaintiff, would have been dangerous, and likewise unlikely because purposeless. Plaintiff admits that the engineer "must have released his brakes and applied steam in backward motion in order to have brought about the motion which caused his injury," but contends he "may have intended to move forward, either of his own volition or by virtue of a signal from one of the other members of the crew, and, forgetting the machinery of his engine still stood in backward motion, he opened the throttle and the engine started backward, and he immediately shut it off, but enough movement had taken place to do the damage." There is no evidence of such a happening, or of any signal, but a presumption from defendant's failure to call plaintiff's fellow brakeman as a witness is invoked in its support. In short, an unsupported possibility is advanced in aid of verdict, on the theory that the witness, if called, would have so testified. It does not appear, however, that he observed how the engine was handled or could have seen, in the darkness, had he looked, nor that he knew of any fact likely to throw light on the question involved. Omissions to call witnesses are often circumstances proper for consideration in weighing the evidence introduced; but cannot be substituted for affirmative proof.

Other matters must also be taken into account; in which connection it may be suggested that if plaintiff's theory be correct, and if, as he claims, no yielding of the car-couplers occurred after the impact while

the cars were "settling" it is difficult to understand how his head became released. Our conclusion is that the verdict is unsupported; and also that, from the whole record, the evidence and probabilities point at least in the same degree to the "settling" of the cars or poles being the cause of plaintiff's injury as to plaintiff's hypothesis. The case does not, however, warrant judgment for defendant.

Order reversed and new trial granted.

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**FRANK H. WILKOWSKE v. MARGARET LYNCH.<sup>1</sup>**

February 6, 1914.

Nos. 18,407—(239).

**Incompetent — appointment of guardian.**

1. Under G. S. 1913, § 7433, it is not necessary in order to confer jurisdiction of the subject-matter that a petition for the appointment of a guardian state that it is made by the county board, or by a relative or friend of the incompetent. It is sufficient if it be so made in fact. It does not affirmatively appear that it was not so made in fact. It is therefore presumed that the court had jurisdiction of the subject-matter. Any defects in the respect mentioned or in the facts set forth in the petition are waived if not taken advantage of on the trial.

**Finding sustained by evidence.**

2. A finding that the person for whom a guardian was asked was, by reason of old age and the loss and imperfection of mental faculties, incompetent to have the care and management of her person and estate, *held* sustained by the evidence.

**Selection of guardian.**

3. There was no abuse of discretion in selecting as guardians the persons appointed, rather than others suggested by the incompetent.

Frank H. Wilkowske petitioned the probate court for Rice county for the appointment of a guardian of the person and estate of Margaret Lynch, an incompetent by reason of old age and imperfection

<sup>1</sup> Reported in 145 N. W. 378.

of mental faculties. Margaret Lynch filed objections to the appointment of the person named in the petition and prayed that the petition be dismissed, but, if the court denied her prayer, that it would appoint the person named by her. The court, George L. Smith, J., appointed W. O. Gilruth guardian of her estate and Mrs. Mary E. Thatcher guardian of her person. From the order of appointment Margaret Lynch appealed to the district court for that county. The appeal was heard before Childress, J., who made findings and affirmed the order of the probate court. From the judgment entered pursuant to the order of affirmance, Margaret Lynch appealed. Affirmed.

*Moritz Heim*, for appellant.

*James P. McMahon*, for respondent.

BUNN, J.

This is a proceeding for the appointment of a guardian of the person and estate of Margaret Lynch. The probate court of Rice county made an order appointing W. O. Gilruth guardian of the estate of the alleged incompetent, and Mary E. Thatcher guardian of her person. Margaret Lynch appealed to the district court, where there was a trial *de novo* before the court without a jury. The district court rendered a decision ordering judgment affirming the order appealed from. Judgment was entered pursuant to the decision, and this appeal taken from such judgment.

Appellant makes three contentions: (1) That the probate and district courts were without jurisdiction of the subject-matter, because the petition was not made by a relative or friend of the alleged incompetent, or by the county board, and because it did not state facts sufficient to give jurisdiction; (2) the evidence does not sustain the finding of the court that Margaret Lynch is incompetent to have the care and management of her person and estate; (3) if the evidence warranted the appointment of a guardian, the court abused its discretion in not appointing the person or persons designated by appellant.

1. The petition was made by Frank H. Wilkowske. He was chairman of the county board, and testified that he made the petition in

that capacity. The petition did not state that it was made by the county board, or by a relative or friend. The statute, G. S. 1913, § 7433, provides that "such appointment may be made upon the petition of the county board, or of any relative or friend of such person." This statute does not require that the petition shall state that the maker is the county board, or a relative or friend, and we hold that such a statement is not necessary in order to give the court jurisdiction of the subject-matter.

It is sufficient if in fact the maker of the petition is the county board, or a relative or friend. We may assume perhaps that Wilkowske was not a relative of the alleged incompetent; as to his being a "friend," there is no evidence either way. He testified that he acted in making the petition as chairman of the county board. There is no evidence that the board authorized his action by resolution, and no evidence that it did not. The probate court is a court of superior jurisdiction and enjoys the same presumptions of jurisdiction as superior courts of common-law jurisdiction. 2 Dunnell, Minn. Dig. § 7774. Its jurisdiction over the subject-matter, including its authority to hear and determine the particular proceeding, is presumed in the absence of facts affirmatively appearing on the face of the record that show want of jurisdiction. 1 Dunnell, Minn. Dig. § 2347. The facts appearing from the record in this case do not affirmatively show that the petition was made by a person not authorized to make it, and we therefore hold that it does not appear that the court did not have jurisdiction of the subject-matter. Any insufficiency in the petition in the respect mentioned, or in the facts set forth therein constituting the grounds for the appointment of a guardian, should have been taken advantage of by appropriate pleadings, motions or objections at the trial. The answer interposed to the petition made no point against its sufficiency, nor was any such point made on the trial. The defects, if any, were waived.

2. If there was any insufficiency in the evidence tending to show that Margaret Lynch was by reason of old age or imperfection of mental faculties incompetent to manage her own affairs, it may be accounted for by the fact that there was no contest on this issue at the trial. When respondent asked a witness a question relating to

the condition of Miss Lynch, her attorney objected expressly on the ground the evidence was immaterial, "since the guardianship isn't contested." The witness was allowed to testify, however, and gave evidence fairly tending to show the necessity of the appointment of a guardian. No evidence was offered in opposition. Indeed the only question tried was as to whom the court should appoint. We hold the attacked finding supported by the evidence.

3. There was no abuse of discretion in selecting the persons named as guardians. It is not claimed that either appointee was not a suitable person, except that the incompetent preferred the appointment of others. We cannot hold that the court abused its discretion because it was not guided by the wishes of respondent as expressed in her answer, and as testified to by witnesses on the trial.

Judgment affirmed.

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COUNTY OF MORRISON v. CHARLE LEJOURBURG and  
Others.<sup>1</sup>

February 6, 1914.

Nos. 18,415—(232).

**County ditch — bond for preliminary expense.**

1. Petitioners who execute a bond in a ditch proceeding under Laws 1905, c. 230, conditioned to pay the preliminary expense if the ditch is not established, are liable thereon to a county which in good faith proceeds with the petition, though the description of the route and termini of the ditch in the petition is so defective as to render the proceeding invalid on jurisdictional grounds.

**Authority of county board to act at special meeting.**

2. Under Laws 1905, c. 230, § 9, the county board may either establish or refuse to establish a ditch at a special meeting called for a rehearing of a petition and report when the final order establishing or refusing to establish a ditch has been held void for failure to give proper notice of hearing.

<sup>1</sup> Reported in 145 N. W. 380.

**Evidence of expense.**

3. The evidence justifies the finding of the court as to the amount of the preliminary expense.

**Judgment not res judicata.**

4. A judgment entered upon the dismissal of an action on motion of the defendant at the close of the plaintiff's testimony for insufficiency of evidence is not *res judicata*.

Action in the district court for Morrison county to recover \$606.75 upon defendants' bond, given pursuant to Laws 1905, c. 230, to secure payment of the preliminary expenses in a certain ditch proceeding. The case was tried before Nye, J., who made findings and ordered judgment in favor of plaintiff for the sum of \$355.80. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. **Affirmed.**

*E. A. Kling and F. W. Lyon*, for appellants.

*D. M. Cameron*, for respondent.

**DIBELL, C.**

This is an action by the plaintiff county against the defendants on a bond in a ditch proceeding given pursuant to Laws 1905, p. 303, c. 230. There were findings for the plaintiff and the defendants appeal from the order denying their motion for a new trial.

1. The defendants who executed the bond were petitioners in the ditch proceeding. The description of the route and termini of the ditch was defective. We assume that the proceeding was without jurisdiction. The bond was conditioned, as required by the statute, to pay all expenses in case the county board failed to establish the proposed ditch. The purpose of requiring a bond is clear. If the ditch is established the preliminary expense to which the county is put is assessed against the property and the county is repaid. If the ditch is not established there is no assessment for the preliminary expense. The statute intends that the parties interested shall furnish a bond indemnifying the county in such case. Conceding that the defects in the description were jurisdictional, we hold that the petitioners who signed the bond and who thereby induced the county board in good faith to incur expense preliminary to the es-

establishment of the ditch are liable on their contract embodied in the bond. It is not necessary to invoke the doctrine of estoppel. The petitioners are liable on their contract. They are required to do only what they agreed to do.

2. By Laws 1905, p. 314, c. 230, § 9, it is provided that when a final order of the county board establishing or refusing to establish a ditch is declared void because of a failure to give proper notice of hearing a special meeting may be called at which the commissioners "shall proceed to reconsider such report, shall act upon the same and make findings thereon and may establish such ditch." On September 17, 1909, the county board, on insufficient notice, heard the report and refused to establish the ditch. In an action on the bond commenced in November, 1909, the court dismissed the action because of the insufficiency of the notice of the September meeting and judgment was entered. This was in effect an adjudication that the final order of the board was void for want of notice. On June 29, 1910, at a meeting duly held, the board refused to establish the ditch. The defendants claim that at such a meeting the statute permits the board to establish a ditch but not to refuse to establish it. A fair construction of the language quoted permits it to do either.

3. The defendants claim that the award is excessive. The court gave careful attention to the individual items of expense legally incurred and we find no error.

4. In November, 1909, the plaintiff commenced an action against the defendants to recover upon this bond. At the close of the testimony the action was dismissed upon motion of the defendants and judgment of dismissal was entered. This judgment is not a bar to the present action. To be a bar a judgment must be on the merits. A judgment of dismissal, upon the motion of the defendant, without findings or verdict, because of the insufficiency of the evidence, is not *res judicata* and the matter litigated may be relitigated in a subsequent action. *Craver v. Christian*, 34 Minn. 397, 26 N. W. 8; *Andrews v. School District No. 4*, 35 Minn. 70, 27 N. W. 303; *McCune v. Eaton*, 77 Minn. 404, 80 N. W. 355.

Order affirmed.

124 M.—32.



VILLAGE OF MINNEOTA v. JACK MARTIN.<sup>1</sup>

February 6, 1914.

Nos. 18,419—(218).

**Violation of village ordinance — evidence in prosecution.**

1. In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, or section, and it is not necessary to introduce the ordinance in evidence.

**Auctioneer — amount of license fee.**

2. It is not made to appear that a twenty-five dollars per day license fee for auctioneers, which villages are authorized to impose by chapter 138, Laws of 1905, is so large as to be beyond the scope of legislative discretion.

Complaint was filed in justice court against Jack Martin for violating an ordinance of plaintiff village in exercising the trade of auctioneer without first having obtained a license. From the judgment rendered in justice court wherein defendant was fined \$25, he appealed to the district court for Lyon county. The appeal was heard upon stipulated facts by Olsen, J., who made findings and affirmed the judgment of the justice court. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*J. E. Regan and Ivan Bowen, for appellant.*

*Gislason & Gislason and James H. Hall, County Attorney, for respondent.*

HOLT, J.

The question presented on this appeal is the validity of an ordinance of the village of Minneota, requiring an auctioneer to pay a license fee of \$25 for each day that he pursued his calling as such within the village. Defendant was convicted of a violation of this ordinance and appeals from the judgment.

<sup>1</sup> Reported in 145 N. W. 383.

There was no settled case so that the only record before us is the complaint, findings and judgment. The point is made that the evidence not being here the ordinance cannot be considered. This would be true if the law had remained the same as it was when the village was incorporated. But the general village law of 1875 was amended by chapter 145, p. 148, Laws of 1885, bringing all villages under its operation, whether formed under general or special laws. The substance of the law, as subsequently amended by chapter 122, p. 230, Laws 1889, and applicable here, is found in section 1265, G. S. 1913, and reads: "It shall be a sufficient pleading of the by-laws, rules, or ordinances of a village to refer to the section and number or chapter thereof. They shall have the effect of general laws within the village, and need not be given in evidence upon the trial of civil or criminal actions." In other words, the court takes judicial notice of the provisions of the ordinance in this action, and must consider its validity.

The ordinance in question was passed in 1901. The law then conferred precisely the same power upon the village council (section 1224, G. S. 1894, being chapter 122, p. 230, Laws of 1889) given by chapter 138, p. 175, Laws of 1905, in respect to restraining or licensing auctioneers, hawkers and peddlers. The fact that chapter 122, p. 230, Laws of 1889, was repealed in terms by Revised Laws of 1905 does not change the situation because chapter 138, p. 175, Laws of 1905, went into effect prior to such repeal. There is no escape from the conclusion that the legislature has authorized a village to impose a license fee of \$25 per day on an auctioneer. The law giving the authority, so far as material to the matter in hand, reads: "To restrain or license, regulate and tax auctioneers, hawkers and peddlers; and in all such cases they may fix the price of said license or tax, and prescribe the term of the continuance of such license, and may revoke such license when in the opinion of the village council the good order of [or] the public interests of the village require it; provided, that the council may in any case where, in their opinion, the public interests of the citizens of the village require it, refuse to grant any license for the above purposes, and provided, also, that twenty-five (\$25) dollars a day shall be

construed by the courts of said state as a reasonable price per day for an auctioneer's license issued under the above provision."

We agree with appellant that the court is not bound by the legislative construction of what is a reasonable license fee. If such construction contravenes constitutional guaranties, courts should not hesitate to hold it for naught. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. 663. But it is elementary that courts should not set aside a statute unless satisfied beyond a doubt of its infringement upon some right guaranteed by state or Federal Constitution. That it so does must be made to appear either from evidence or from matters of which courts have judicial notice or knowledge. In this case there is no evidence and no findings of fact which bear on the reasonableness of the fee. *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L.R.A. 588, 47 Am. St. 697. In *Trenton Horse R. Co. v. City of Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L.R.A. 410, it is said: "The judicial power to declare it void can only be exerted when from the inherent character of the ordinance or from evidence taken showing its operation it is demonstrated to be unreasonable." An ordinance "will be presumed to be reasonable, unless the contrary appears from the law itself, or is established by proper evidence." *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. St. 85.

Although the statute authorizes villages to license and tax auctioneers, we think it plain that in this ordinance is found no attempt to tax, and the legality of the fee must rest on the reasonableness thereof within the scope of a proper exercise of the police power.

It is well settled that upon this last-mentioned basis a license fee may be of sufficient amount to include the expense of issuing the license and the cost of the necessary police surveillance connected with the business or calling licensed. And, when the license relates to a vocation or business which the municipality has the power to regulate, the license fee may be sufficiently large to work a restraint. *City of Duluth v. Krupp*, 46 Minn. 435, 49 N. W. 235; *State v. Jensen*, 93 Minn. 88, 100 N. W. 644. While it is true that the legislature may not, under the pretense of regulating and licensing a lawful calling or business, prohibit, it is nevertheless

true that frequently individuals must subordinate their rights to a certain extent to the demands of the public welfare. No authority can be found holding an auctioneer not subject to the police power of regulation. *People v. Grant*, 126 N. Y. 473, 27 N. E. 964, states that "The right to regulate, control and limit the number of persons employed in such business has been exercised by the legislature as one of its acknowledged police powers from colonial times to the present and, I believe, has never been questioned." What a regulatory license fee shall be is largely within the legislative discretion. *City of St. Paul v. Colter*, 12 Minn. 16 (41).

It is insisted that this case is ruled by *City of Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361, wherein the business of an auctioneer is designated as a lawful and useful one. And in *City of Duluth v. Krupp*, supra, the vocation of the auctioneer is conceded to be on a higher plane than that of peddling, which is apt to degenerate into a nuisance if not regulated and restrained. Each occupation is lawful and may be useful both to the individual who pursues it and to the community. But we believe both are equally liable to abuse. No doubt the legislature was convinced thereof or else such substantial license fee, indicating a purpose to restrain, would never have been authorized. *State v. Finch*, 78 Minn. 118, 121, 80 N. W. 856, 46 L.R.A. 437. And we may observe that no one about the time of the enactment of this statute could have walked on the main streets of our large cities, especially near railroad depots, without being convinced that the business of auctioneers was fast degenerating into a nuisance and had become a subject of restraint. In *Town of Decorah v. Dunstan*, 38 Iowa, 96, an auctioneer's license fee of \$20 per day was upheld; but in *City of Ottumwa v. Zekind*, 95 Iowa, 622, 628, 64 N. W. 646, 29 L.R.A. 734, 58 Am. St. 447, a license fee of \$25 per day for a transient merchant was held prohibitive, Justice Deemer observing with reference to the first-mentioned case: "The fee charged an auctioneer may well be larger than that imposed upon a transient merchant, on account of the character of the business, and the greater necessity for supervision over the auctioneer. Again there was no showing that the fee demanded of defendants in that case was an unreasonable one." We cannot

say that the business of an auctioneer is not of the kind liable to become inimical to the welfare of the community, unless restrained in villages and cities.

Because a yearly license of \$300 was held prohibitive and invalid in *City of Mankato v. Fowler*, *supra*, it does not necessarily follow that a per diem license fee of \$25 must fall. If an auctioneer could get but a single day's work under the Mankato ordinance, he was compelled to pay \$300 to secure it. There it also appeared from the findings that the ordinance was prohibitive, for it was found that no auction had taken place in the year the ordinance was in operation, whereas previously such auctions were frequent. Nor may it be said that a per diem license fee may not properly be much larger than the proportion of a legitimate annual fee. In *re White*, 43 Minn. 250, 45 N. W. 232, concerning the validity of a peddler's license of \$3 per diem, the court states: "There is a clear distinction between the case of persons who are engaged the whole year in one place, in some permanent business, and that of hawkers and peddlers, who are transient, and usually remain only a short time in one place. What might be an excessive fee, estimated by the day, as to the former, might not be so as to the latter. The cost of issuing the license would be the same for the short term as for the long one, and the expense of police supervision (which may undoubtedly be taken into account in fixing the amount of the license fee) may be relatively much greater in the case of a temporary and transient business."

As stated before, we are left in the dark in this case, as to the extent to which auctions may be called for in villages like Minneota. It may be that during any one year the village will not afford legitimate opportunity for an auction except for a day or two. Usually the legislature leaves the reasonableness of the fee to the municipality, and, when its proper law-making body has exercised its discretion as to the amount, courts reluctantly interfere, and only when it is clear that there has been an abuse of discretion. Here the legislature itself has exercised its judgment as to what is a reasonable license fee. We may well assume that the legislators informed themselves of the situation and did not act merely on such knowledge as

courts are charged with possessing. As this case is presented by the record, we are unable to say that it appears beyond reasonable doubt to our minds that this license fee is oppressive, prohibitive or unreasonable.

We do not think any other question meriting discussion is raised by the appeal.

Judgment affirmed.

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FULTON M. SKAGGS v. ILLINOIS CENTRAL RAILROAD COMPANY.<sup>1</sup>

February 6, 1914.

Nos. 18,528—(303).

**Evidence of negligence — Federal act.**

1. Evidence in an action by a freight brakeman to recover damages sustained, while jointly engaged with a fellow brakeman in switching movements, by being caught between the engine tender and cars left on another track, considered and *held* to warrant findings that, under the circumstances disclosed, plaintiff had the right to rely on the other brakeman's statement that the cars were clear for the engine to pass, and that the making thereof constituted negligence attributable to defendant under the Federal Employer's Liability Act.

**Charge to jury.**

2. Charge *held* not subject to the criticism that it authorized a recovery for acts of negligence not alleged or alleged but not proved.

**Same — comparative negligence.**

3. Charge upon so-called comparative negligence under the Federal act held technically erroneous, but not prejudicial.

Action in the district court for Ramsey county to recover \$60,000 for injury received while in the employ of defendant. The answer alleged that the injury was caused wholly by the negligence of plaintiff, and set up a former action pending between the same parties

<sup>1</sup> Reported in 145 N. W. 381.

upon the same cause of action. The case was tried before Stanton, J., and a jury which returned a verdict of \$15,000 in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. Affirmed.

*Butler & Mitchell* and *C. M. Bracelen*, for appellant.

*Barton & Kay*, for respondent.

PHILIP E. BROWN, J.

Appeal by defendant from an order denying a new trial after verdict for plaintiff in an action to recover damages for personal injuries.

Plaintiff, a freight brakeman in defendant's employ, was injured at about 2 o'clock, a. m., on a cold, dark night in January, 1913, while engaged in switching cars at a station. His train stopped on the main line, with the caboose near the station. Two cars, some distance from the engine, were to be set out on a track known as No. 4, and plaintiff, head brakeman, Buchta, rear brakeman, and the conductor, so understood. Plaintiff uncoupled the train behind these two cars, and, with Buchta, rode the undetached cars northward on the main track. The latter dropped off and lined up the switches for track 4, which lay westerly, while plaintiff remained on the cars until they passed beyond the most northerly switch on the main line. This he turned when the rear car had cleared it, and signalled to back, riding the train back to a point near the switch to track 4, where the two cars were left. The engine, with remaining cars, then moved forward, plaintiff accompanying them through the main line switch. He then signalled, and they were backed down again on the main track, the purpose being to return to the yards with engine alone to finish setting the two cars left near track 4, and to pick up other cars which were to be added to the train. In proceeding to carry out these movements, the engine was uncoupled and ran north past the same switch, which plaintiff threw. He then gave a back-up signal and boarded the rear corner of the backing tender. While in this position he was caught between it and the corner of the foremost car on the main track and injured, these cars not having been

shoved down far enough to clear the engine so it could pass on the switch track.

Plaintiff claims while the engine and cars were backing down the main line, after leaving the two cars in the yard and before the engine was uncoupled, he received a stop signal from the conductor, which he repeated, and thereupon the train stopped on the main line. He then proceeded to the station, and was advised by the conductor for the first time that the other cars were to be picked up, and was directed with reference to further movements. Acting accordingly, he returned to the engine, where he found Buchta at the rear of the tender, on the opposite side of the cars, nearest the switch track, who then uncoupled the air hose between the tender and cars, while plaintiff was attempting to disengage the coupling pin. The former, however, pulled the pin from his side, and plaintiff, not knowing whether the cars had cleared the switch, and having previously advised Buchta of the intended movement, inquired of him whether they were in the clear for the engine to back upon the switch track, boarding the engine at the same time. But, not receiving a satisfactory answer, he stopped and alighted from the engine, and again made the same inquiry, to which Buchta replied: "They are clear a mile, go ahead, and if we don't get out of here the 16-hour law will catch us." Whereupon plaintiff proceeded and was injured as stated. This, plaintiff's, version of how the accident occurred was disputed in all material respects; but the questions raised were clearly for the jury.

1. The train was engaged in interstate commerce and concededly the Federal Employer's Liability Act<sup>1</sup> applies. Defendant, however, urges nonliability for the alleged negligence of Buchta in making erroneous statements with reference to facts equally obvious to plaintiff, claiming such to be merely an opinion; and, further, that as they were jointly engaged in uncoupling the engine from the cars and seeing to it that they cleared, Buchta's negligence, if any, was plaintiff's and not defendant's. These contentions cannot be sustained. Buchta's statement, under the circumstances, was sufficient

<sup>1</sup> [34 St. 232, U. S. Comp. St. Supp. 1911, p. 1316.]



to warrant the jury in finding that it constituted negligence. It was a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto. Their being jointly engaged in working out the switching operations is of no more significance upon the question of defendant's responsibility for Buchta's negligence than is any other instance of a fellow servant's negligence, for which, under the Federal act, the master is liable. We hold Buchta's negligence attributable to defendant.

2. Grounds of negligence were alleged in the complaint other than last referred to, and error is assigned because the court's instructions were broad enough to indicate to the jury that they might find defendant liable thereon and otherwise, notwithstanding lack of evidence to establish them and without regard to pleadings. We do not find the charge subject to this criticism. Read as a whole it directs the jury's attention to the sole questions of fact for determination. Moreover, if counsel feared misapprehension in this regard, attention should have been promptly called thereto, which was not done.

3. The court read to the jury from the Federal Employer's Liability Act, as follows [folio 927]:

"That in all actions hereafter brought against any common carrier by railroad under this act to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The court then charged, after adverting to the common-law rule:

"But this law changes that rule and provides, as you will have noted from my reading of the section, that when, in an action such as this, the plaintiff is himself guilty of negligence which was a proximate cause of the injury, that he will, notwithstanding that, be entitled to recover a proportionate amount of the total injury sustained. His negligence (if he was negligent) would be taken into consideration, and that a comparative amount, depending upon the ratio of his

negligence to the negligence of the defendant, would be considered by you."

And also, in summing up, the following was given:

"If, however, you reach the conclusion from all the testimony that the employee Buchta was negligent, then the plaintiff is entitled to recover such sum as will fairly and justly compensate him for the injuries sustained by him, unless he was himself negligent, unless the plaintiff was guilty of contributory negligence, in which event you would take into consideration his negligence in comparison with the negligence of the defendant and reach your conclusion as to the amount under the instructions which I have given you."

Defendant complains of the court's construction of the Federal act, as indicated by the foregoing excerpts, citing and relying on *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, decided since the trial of the present case. Therein the Supreme Court of the United States considered, for the first time, the correctness of an instruction upon the provision of the Federal act in question, and criticised a charge similar to the one here involved; it not appearing, however, whether reversal on account thereof would have followed had proper exception been taken. Said the court, at page 121, after approving prior portions of the charge:

"But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. \* \* \* Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had at-

tention been specially called to it, and possibly it was not prejudicial to the defendant."

In view of this authoritative pronouncement, it is apparent that the instruction complained of was technically erroneous; but we are satisfied that upon the whole instruction no prejudice to defendant resulted.

Order affirmed.

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STATE ex rel. LYNDON A. SMITH, as Attorney General, v.  
PROBATE COURT OF COUNTY OF RAMSEY and Another.<sup>1</sup>

February 6, 1914.

Nos. 18,559—(308).

**Inheritance tax — transfer of property — situs of debt.**

Acting under a power of appointment in a will executed by his mother in Kentucky, a testator residing in Minnesota exercised the power in his will, naming his nephews, residents of Tennessee, as the beneficiaries. The property which was the subject of this exercise of the power was indebtedness of corporations and individuals secured by bonds and mortgages which were at the time of the testator's death and for many years had been in the custody of a resident of Kentucky. It is *held*:

(1) It was the exercise of the power of appointment that constituted the transfer of the property, and not its creation.

(2) Under the inheritance tax law of this state, the appointment when made is a taxable transfer, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of the power, and had been bequeathed or devised by the will. Therefore this

<sup>1</sup> Reported in 145 N. W. 390.

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Note.—On the question of inheritance or succession tax on property covered by power of appointment in cases of nonresidents, see note in 33 L.R.A.(N.S.) 239, 248. And upon the liability of a debt due from resident to nonresident to succession tax, see note in 4 L.R.A.(N.S.) 953.

As to when debt may have situs for the purpose of taxation apart from domicile of creditor, see notes in 2 L.R.A.(N.S.) 637 and 14 L.R.A.(N.S.) 493.

case is treated as though the testator had actually owned the property, and had bequeathed it to his nephews.

(3) As between debtor and creditor, the situs of a debt is the domicile of the creditor. But he may give it a situs elsewhere, and it may be taxed under the laws of the state where the evidences of indebtedness are deposited. But our statute imposes a tax upon the transfer of the property, and not upon the property itself. The transfer having been made in this state by a resident thereof, is taxable here, although the actual situs of the property was at the time of the testator's death in Kentucky, and although such transfer may be subject to a tax in Kentucky.

Upon the relation of the attorney general, this court issued its writ of certiorari to review an order of the probate court for Ramsey county, Bazille, J., determining the amount of the inheritance tax due to the state from the estate of George S. Heron, deceased. Reversed with directions.

*Lyndon A. Smith*, Attorney General, and *William J. Stevenson*, for relator.

*Charles P. Hall*, for respondent.

. BUNN, J.

Certiorari to review an order of the probate court of Ramsey county determining the amount of inheritance tax to be paid by the legatees of George S. Heron, deceased. The undisputed facts appear from the return of respondents to the writ, and are as follows:

More than 15 years ago Sarah Heron, a resident of Kentucky, died, leaving a will which was probated in that state. By this will, the testatrix gave to her executor in trust for the use and benefit of her two sons, William and George S., the residue of her estate. The trustee was given the management and control of the property, with power to sell and reinvest the proceeds. The income of the trust estate, the testatrix bequeathed to her two sons, to be paid to them equally as it was collected by the trustee. She gave to these sons the right of disposing of by will the entire trust estate. Each was given the right to make his will, disposing of as he might choose one moiety of said trust estate. If both died intestate, the entire trust estate was to descend and be distributed according to the laws of

Kentucky. If one son should die testate and the other intestate, the moiety of the one dying testate was to descend as he should direct by his will, and the remaining moiety should descend and be distributed according to the laws of Kentucky.

William Heron was at the time of his mother's death and still is a resident of the state of Tennessee. George S. Heron was then and until his death a resident of the state of Minnesota, living in St. Paul. The trustee was and still is a resident of Kentucky. George S. Heron died May 10, 1912, leaving real and personal property in Ramsey county. At the time of his death the corpus of the entire trust estate was \$104,870.05. It consisted entirely of personal property, bonds and mortgages, all in the possession of the trustee in Kentucky. George S. Heron died testate. After making certain specific bequests, the will gave to the testator's brother William, during his lifetime, one-half of "what would be my share, if living, of the income derived from the estate of my deceased mother." Upon the death of William, the will provided that "my said interest in my said mother's estate shall pass to and be vested in my nephews, Shirley S. Heron and William Edgar Heron \* \* \* sons of my said brother, in equal shares forever." There was a residuary clause in which these nephews were named as beneficiaries, in equal shares.

The question is whether this exercise by George S. Heron of the power of appointment given to him by the will of his mother, was a transfer of property that is taxable under the inheritance tax law of this state. The probate court held that it was not.

Our statute, Laws 1905, p. 427, c. 288, as amended, (G. S. 1913, § 2271) provides in section 1: "A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein or income therefrom in trust or otherwise, to any person \* \* \* in the following cases:

(1) "When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

(2) "When a transfer is by will or intestate law of property

within the state or within its jurisdiction, and the decedent was a nonresident of the state at the time of his death."

(3) (Relates to transfers in contemplation of death)

(4) (When tax to be imposed)

(5) "Whenever any person \* \* \* shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will," etc.

1. George S. Heron by his will clearly exercised the power of appointment created by the will of his mother. It is the exercise of the power of appointment which effects the transfer, gives the grantee the property, and not its creation. The language of the statute is that "such appointment when made shall be deemed a transfer." The authorities are uniform on this point. *Matter of Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L.R.A. 433, 88 Am. St. 508; *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956; *Matter of Delano*, 176 N. Y. 486, 68 N. E. 871, 64 L.R.A. 279; *Chanler v. Kelsey*, 205 U. S. 471, 27 Sup. Ct. 550, 51 L. ed. 882; *Attorney General v. Upton*, L. R. 1 Ex. 224.

Had the property transferred by this exercise of the power by Heron been real estate in Minnesota, or personal property having its actual situs in the state, there can be no doubt that the transfer would be taxable under our statute. The statute says that such appointment shall be deemed a transfer taxable under the provisions of the act "in the same manner as though the property to which such appointment relates, belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." We must treat the case, therefore, as though the bonds, and mortgages which constituted the corpus of the trust estate, though in the actual custody of a nonresident, belonged absolutely to George S. Heron, and he had bequeathed them to his nephews. *Matter of Cooksey*, 182 N. Y. 92, 74 N. E. 880; *Matter of Fearing*, 200 N. Y. 340, 93 N. E. 956.

3. Heron was a resident of Minnesota, and exercised the power of appointment here. Treating the indebtedness evidenced by these securities as the absolute property of Heron, as, under the statute, we must for the purposes of this case, their situs as between the debtor and the creditor was the domicile of the latter. State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. ed. 179; Matter of Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L.R.A. 238, 55 Am. St. 632; Matter of Fearing, 200 N. Y. 340, 93 N. E. 956. It is well settled, however, that in modern times the old rule that the situs of personal property is the domicile of the owner, "has yielded more and more to the *lex situs*, the law of the place where the property is kept and used." Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613. For the purposes of taxation, the law may separate personal property from the person of its owner, and give it a situs of its own. Tappan v. Merchants National Bank, 19 Wall. 490, 22 L. ed. 189; Savings & Loan Society v. Multnomah County, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. ed. 803; New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701; In re Jefferson, 35 Minn. 215, 28 N. W. 256; 2 Notes on Minnesota Cases, 872. As stated by Chief Justice Gilfillan in the Jefferson case, the rule that the domicile of the owner is deemed the situs of his personal property "is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." In the Bristol case, in which the Jefferson case was upheld and followed, Mr. Chief Justice Fuller said [p. 145]: "Personal property, as this court has declared again and again, may be taxed, either at the domicile of its owner, or at the place where the property is situated, even if the owner is neither a

citizen nor a resident of the state which imposes the tax." It is doubtless true, under these decisions, that the state of Kentucky could and probably has taxed this property, and also that it has not been taxed in Minnesota. And it is probably true, the bonds being deposited in Kentucky, that Kentucky could tax a transfer of the property by its Minnesota owner. *Matter of Whiting*, 150 N. Y. 27, 44 N. E. 715, 34 L.R.A. 232, 55 Am. St. 640; *Matter of Lord*, 186 N. Y. 549, 79 N. E. 110; *Beers v. Glynn*, 211 U. S. 477, 29 Sup. Ct. 186, 53 L. ed. 290. But this is not controlling. The question is whether the transfer in Minnesota by the owner residing in Minnesota, escapes the tax because the evidences of indebtedness are not in the state. Though there can be no suspicion in the instant case of any attempt to evade the inheritance tax law, it is easy to see how an owner of bonds could easily do so, if we held this transfer not taxable. He might deposit his securities in a bank or strong box located in some state or county that had no inheritance tax law, and thus escape the payment of the tax. In *Ross on Inheritance Taxation*, § 173, the author says: "In a majority of the states, the personal property of a resident decedent is held subject to the inheritance tax law of the state, although actually situated in another state, where it may also be taxed by the statutes of that state. Otherwise stated, personal property within the jurisdiction of a foreign state is subject to the inheritance tax at the place of the decedent's domicile. This is on the theory that the tax imposed upon the transmission of the property is governed by the law of the domicile of the owner." The cases cited by the author fully support the text. *Appeal of Gallup*, 76 Conn. 617, 57 Atl. 699; *Appeal of Hopkins*, 77 Conn. 644, 60 Atl. 657; *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623; *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881, 16 L.R.A.(N.S.) 329, 14 Ann. Cas. 859; *Matter of Swift*, 137 N. Y. 77, 32 N. W. 1096, 18 L.R.A. 709; *Estate of Lines*, 155 Pa. St. 378, 26 Atl. 728; *Estate of Hartman*, 70 N. J. Eq. 664, 62 Atl. 560. The *Swift* case is notable because Judge Gray, who wrote the opinion, argued quite persuasively that the law in reality imposed a tax on the property of the decedent, and not on the transfer, and therefore that the tax was only enforceable as to property



which, at the time of its owner's death was within the territorial limits of the state. But the other members of the court were of the contrary opinion, and the decision was that a transfer of personal property by a resident decedent was subject to the tax, whether situated within or without the state. And the cases are quite unanimous in holding to the doctrine that an inheritance tax is not a tax on the property, but a tax on the transfer, or right of succession. *State v. Bazille*, 97 Minn. 11, 106 N. W. 93, 6 L.R.A.(N.S.) 1732, 7 Ann. Cas. 1056. In *Appeal of Hopkins*, supra, the supreme court of Connecticut, in speaking of the statute of that state, said [p. 652]: "The act is framed in view of the principle that personal property is bequeathed by will and is descendible by inheritance, according to the law of the domicile, and that the disposition, distribution of, and succession to personal property, wherever situated, is to be governed by the laws of that state where the owner had his domicile at the time of his death." The New Jersey court, in *Estate of Hartman*, supra, holds that the situs of personal property of a testator, for the purposes of the inheritance tax, is his domicile at the time of his death, no matter if its actual situs is in another state. The court observes [p. 667] that the result of its decision would be, in the case before it, "the requirement of the payment of two taxes, of like character, by the same legatees, for the right of succession to the gift of the testatrix," but says that "this unfortunate situation cannot control the determination of the questions presented." So in *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439, Mr. Justice Holmes, after saying [p. 204] that no one doubts "that succession to a tangible chattel may be taxed wherever the property is found," though it may also be taxed by the law of the domicile, observes [p. 205] that "it may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law." We readily agree that it may be regretted that this state should be seen taxing "according to the fact of power" the transfer of personal property

situated within its borders and owned by a nonresident, and at the same time taxing a transfer by a resident of property that has its actual situs in another state, under the fiction of "*mobilia sequuntur personam*," especially when the same transfers may be taxed under the laws of the state where the decedent had his domicile in the one case, and of the state where the property was situated when he died, in the other. But, as said by Justice Holmes, these inconsistencies infringe no rule of constitutional law. It is for the legislature, and not the courts, to remove these "inconsistencies." We note that the inheritance tax law of Massachusetts provides that property of a resident of the commonwealth which is not therein at the time of his death, is not taxable under the provisions of the act, if it is legally subject in another state or country to a tax of like character and amount.

We are obliged to hold, under the language of our statute, and the decisions referred to, that the transfer by Heron of the bonds and mortgages in Kentucky, was taxable here. The case of *Matter of Hull*, 111 App. Div. 322, 97 N. Y. Supp. 701, affirmed by the court of appeals in the opinion of the appellate division, 186 N. Y. 586, 79 N. E. 1107, is almost identical in its facts. In so far as *Matter of Thomas*, 39 Misc. 136, 78 N. Y. Supp. 981, supports the respondent here, it must be considered as overruled by the *Hull* case.

The order of the probate court of Ramsey county is reversed, with directions to enter an order in accord with this opinion.

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STATE v. ALEXIS E. GEORGIAN.<sup>1</sup>

February 6, 1914.

Nos. 18,579—(309).

**New trial — separation of juror in criminal prosecution.**

A temporary separation of a juror from the others, after the case has

<sup>1</sup> Reported in 145 N. W. 385.

been submitted to them, is no ground for a new trial, where the facts and circumstances exclude all reasonable inference, presumption, or suspicion that the juror has been tampered with, and it clearly and affirmatively appears that no prejudice has resulted.

Defendant moved the municipal court of Minneapolis to set aside the judgment convicting him of criminal libel and to grant him a new trial for the reasons stated in the opinion. The motion was denied, Bardwell, J. From the order denying his motion, defendant appealed. Affirmed.

*Grotte & Bowen*, for appellant.

*Daniel Fish*, City Attorney, and *W. G. Compton*, Assistant City Attorney, for respondent.

HALLAM, J.

Defendant was convicted of criminal libel. Only one question is raised on this appeal. After the jury had retired, one of the 12 requested the officer in charge to permit him to go to a toilet room. He was permitted to do so, and to leave the jury room for that purpose. The affidavits on the part of the state are to the effect that the door of the toilet room was about 30 feet from the door of the jury room; that the bailiff accompanied the juror about half-way and then requested the deputy clerk of the court to unlock the door, which he did, and that the juror passed in without conversation with any one. No one else was in the toilet room at the time. In a few minutes the juror came out and returned to the jury room. While he was in the toilet room the officer stood in the hall-way watching the door and also the door of the jury room, both of which were in his sight all of the time.

Defendant in an affidavit states that while the juror was passing through the hall, the juror and the deputy clerk engaged in conversation in a low tone of voice. This is denied by the juror, the deputy clerk and the officer in charge. Defendant moved to set aside the verdict on the ground of this alleged misconduct. The court denied the motion.

It must be assumed that the trial court found that the juror had no such conversation, and that the facts and circumstances "exclud-

ed all reasonable inference, presumption or suspicion that he had been tampered with." The determination of this question was within the peculiar province of the trial court, and, upon the showing made, we ought not to disturb it. *State v. Conway*, 23 Minn. 291.

There was not here any such misconduct as should vitiate the verdict of the jury. We do not wish to minimize the importance of securing the rights of litigants against the possibility of jury tampering. The courts are very properly jealous of any outside influence upon the jury during the course of a criminal trial, and scrutinize with great care any separation of jurors while they are engaged in deliberating upon their verdict. The statute imposes the duty of keeping jurors together after the case has been submitted to them. G. S. 1913, § 9208. The separation of jurors is presumptively prejudicial, unless it clearly and affirmatively appears that no prejudice has resulted. But the law cannot regard trifling and technical irregularities. It would not do to hold that separation of one juror from the others for the purpose and under the circumstances here disclosed, is sufficient to upset a verdict. The same question has arisen twice before in this court, and in each case a new trial was denied. *State v. Conway*, 23 Minn. 291; *State v. Matakovich*, 59 Minn. 514, 61 N. W. 677.

Order affirmed.

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JOHN STREET v. CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY.<sup>1</sup>

February 13, 1914.

Nos. 18,245—(87).

**Passenger — duty of carrier to companion.**

1. One entering a railway train for the purpose of assisting an outgoing

<sup>1</sup> Reported in 145 N. W. 746.

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Note.—The question of the carrier's duty to one assisting passenger on train is discussed in notes in 21 L.R.A. 354; 3 L.R.A.(N.S.) 432; 22 L.R.A.(N.S.) 910; 28 L.R.A.(N.S.) 773; and 46 L.R.A.(N.S.) 357.

passenger, but himself not intending to take passage, is neither a passenger nor trespasser; and the extent of the company's duty, when without notice of his presence, is, in the absence of statute, to exercise ordinary care not to injure him while there or when attempting to alight, which does not include any duty to hold the train to enable him to alight safely.

**Statutory stop of passenger train.**

2. Such a person, however, is within the protection of G. S. 1913, § 4399, requiring passenger trains to stop "a sufficient time, not less than one minute, to safely discharge and receive passengers."

**Statute inapplicable.**

3. Nor is he within the inhibition of G. S. 1913, § 9010, making it unlawful "for any person other than a passenger or employee to get on or off, or attempt to get on or off \* \* \* any engine or car" while in motion.

**Questions for the jury.**

4. Whether defendant violated the duty prescribed by section 4399, and whether plaintiff was guilty of contributory negligence in attempting to alight from the train while it was in motion, *held*, under the evidence, questions for the jury.

Action in the district court for Goodhue county to recover \$3,000 for personal injuries. The amended complaint, among other matters, alleged that defendant and its servants negligently failed to warn plaintiff that it would not be safe for him to enter the car to assist his sister or to warn him that it was not safe for him to attempt to alight from the car after it was started, but on the contrary represented that it was safe and proper for him to do so and that he would have sufficient time to do so and alight from the car before it would start to leave the station, in accordance with law and the usual custom of defendant company in the operation of its passenger trains. The answer admitted that plaintiff's sister became a

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As to the carrier's duty to see that passenger has alighted before starting train at station, see note in 25 L.R.A.(N.S.) 217. And upon the presumption of negligence from sudden starting of car while passenger is alighting, see notes in 12 L.R.A.(N.S.) 611 and 29 L.R.A.(N.S.) 814. And for the time allowed passenger to alight, see note in 4 L.R.A.(N.S.) 140.

The authorities on the question of the negligence of a passenger in getting on or off moving train are reviewed in notes in 21 L.R.A. 354 and 22 L.R.A. (N.S.) 741. And on the question of the construction and effect of a statute making it an offense to get on a moving car or train, see note in 23 L.R.A.(N.S.) 513.

passenger upon one of defendant's trains; that plaintiff accompanied her upon the train, but not for the purpose of becoming a passenger; that he stayed upon the train until it had left the station and that in alighting from the train while it was in motion he sustained some personal injury and denied the other allegations of the complaint, and alleged that the injury was the result of plaintiff's want of due care. The reply expressly denied that plaintiff remained upon the passenger train until it had left the station, and alleged that when he alighted the train was still at the station, being at the platform or pavement maintained by the company for the discharge and reception of passengers and about opposite the north end of the station building, and denied that his injury was caused by any lack of care on his part. The case was tried before Johnson, J., who when plaintiff rested granted defendant's motion to dismiss the action. From the order denying plaintiff's motion for a new trial, he appealed. Reversed.

*C. P. Carpenter*, for appellant.

*F. W. Root, Nelson J. Wilcox and F. M. Wilson*, for respondent.

PHILIP E. BROWN, J.

Plaintiff's action to recover damages for personal injuries was dismissed at the close of his evidence, and this is an appeal from an order denying his motion for a new trial.

Plaintiff entered defendant's passenger train at a station in this state, for the purpose of assisting a lady passenger, himself, however, not intending to take passage, but to leave the car as soon as his errand thereon was accomplished. Entering the front end of the car, they proceeded to a seat near the middle, when, observing the train was in motion, he hastily passed to the rear vestibule, intending to alight, but finding this closed hurried back through the car to the front end, attempted to alight, fell and was injured.

1. Plaintiff was neither a passenger nor trespasser. One entering a car for the purpose of assisting an outgoing passenger, while there so engaged, is under implied invitation from the company; the extent of its duty, if without notice of his presence, being, in the absence of statute, to exercise ordinary care not to injure him while

there or when attempting to alight. The train crew were without notice of plaintiff's presence on the train; hence defendant owed him no common-law duty to hold the train either a sufficient or reasonable time to enable him to alight safely.

Plaintiff's case, however, is not grounded on common-law negligence, but depends upon defendant's failure to comply with the statutory duty—which under the evidence was for the jury—to stop “a sufficient time, not less than one minute, to safely discharge and receive passengers,” prescribed by G. S. 1913, § 4399; while defendant's contention, adopted by the trial court, is that plaintiff's right of recovery, if otherwise sustainable, is defeated by section 9010, which reads as follows:

“It shall be unlawful for any person other than a passenger or employee to get on or off, or attempt to get on or off, or to swing on, or hang on from the outside of, any engine or car or any electric motor or street car upon any railway or track, while such engine, car, motor, or street car is in motion, or switching or being switched. Every person who shall violate any of the foregoing provisions shall be punished by a fine of not more than ten dollars, and any sheriff, constable, or police officer finding any person in the act of violating any such provision shall arrest, take before a proper court or magistrate, and make a verified complaint against him for such violation.”

It may be conceded that, if plaintiff is without the former statute or the exception of the latter, he cannot recover; (for defendant's duty, if any, lay in the first, and the second would constitute a bar under the doctrine that where one's violation of law contributes directly and proximately to his injury he is remediless). The question, then, turns upon the inclusiveness of the term “passengers,” employed in both sections, as indicative of their scope and intended operation. The ordinary rules governing construction of civil statutes should be applied to the first, while the second, being penal, must be strictly construed. We think it clear that plaintiff was within the protection of the provision first quoted. It would violate ordinary rules of construction and be an unwarrantable assumption of legislative intent to hold—especially in view of the universal practice of persons assisting passengers in boarding trains, acquiesced in

by carriers and for their benefit—that one not technically a passenger could not found a claim of negligence upon violation of this statute. On the other hand, under the established rule of construction, it is equally clear that the legislature did not intend thus to restrict the exception of the latter section. The evident purpose was to prohibit trespasses upon engines and cars while in motion, a dangerous practice annoying to the companies, indulged in particularly in towns and villages. Were the purpose protection of persons lawfully on trains, passengers as well as others undoubtedly would have been included in the prohibition; for the same likelihood of injury exists as to both. We do not question the power of the legislature to exempt passengers from the inhibition of the statute; but the construction given must be reasonable and practical, and the intent should control though contrary to the letter, thus preventing absurd and unjust results, to be avoided unless the language used will reasonably bear no other interpretation. 3 Dunnell, Minn. Dig. §§ 8939, 8940, 8947. In the early case of *United States v. Gideon*, 1 Minn. 226 (292), it was held that a criminal offense should not be created by an uncertain and doubtful construction; and this rule has since been adhered to. See *State v. Small*, 29 Minn. 216, 218, 12 N. W. 703; *State v. Finch*, 37 Minn. 433, 34 N. W. 904.

In this connection we cannot be oblivious of the fact that, if this statute is to be read literally, it is openly and hourly violated. In *East v. Brooklyn Heights R. Co.* 195 N. Y. 409, 88 N. E. 751, 23 L.R.A.(N.S.) 513, it was held that a statute making it a misdemeanor for any person to get “on any car or train while in motion for the purpose of obtaining transportation thereon as a passenger,” did not apply to persons in good faith intending to take passage, but only to those endeavoring to obtain transportation contrary to the rules of the company.

“It is contended,” said Mr. Justice Gray, at pages 411, 412, [88 N. E. 752, 23 L.R.A.(N.S.) 513] “that the second subdivision of this section is applicable to plaintiff’s conduct. If this contention is correct, then an act of such common occurrence as to be almost a characteristic trait of our human nature, without distinction of class,



or calling, is stamped with criminality. There is, probably, not an hour of the day, when the statute is not offended against by persons in boarding cars while in motion; if it has the meaning contended for. That the legislature ever intended such an application of its enactment, I do not believe. If there is any doubt as to the proper construction of the statute, then it should receive that which would not lead to unreasonable, if not absurd, consequences. Being penal in its nature, it should not be construed to be applicable to an act, otherwise innocent and natural, and of common occurrence; unless such a legislative intent is clear and unmistakable. If it be conceded that the general language, in which the legislative purpose is expressed, upon its face, raises a doubt as to what was intended, that doubt should be resolved in favor of a construction, which will accord with a just notion of what was to be forbidden."

So also in *Diddle v. Continental Casualty Co.* 65 W. Va. 170, the court, construing a statute similar to ours, declared, at page 177 [63 S. E. 962, 966, 22 L.R.A.(N.S.) 779]:

"The statute is aimed at trespassers. It is penal and ought to be strictly construed. Passengers and employees are expressly excepted, because they are on the premises by invitation of the railroad company, and have right and frequent occasion to board trains."

Authorities are cited in some measure supporting defendant's contention. See *Raben v. Central Iowa Ry. Co.* 74 Iowa, 733, 34 N. W. 621; *Young v. Chicago, M. & St. P. Ry. Co.* 100 Iowa, 357, 69 N. W. 682, (construing an Illinois statute). But it is to be noted that the terms of the statutes there construed are of broader inclusion than ours, not even excepting passengers from their operation. They are not directly in point, and even if they were we would not be content to follow them.

3. Under ordinary circumstances, it is negligence to alight from a moving train; but, when the train does not stop long enough to permit those lawfully on board to leave it, one physically active, with freedom of motion unimpeded, cannot be held guilty of contributory negligence as a matter of law, for alighting when the train is slowly moving by the station platform. The same rules apply as in cases where persons, not trespassers, attempt to or board a moving train.

Hull v. Minneapolis, St. P. & S. S. M. Ry. Co. 116 Minn. 349, 355, 133 N. W. 852; Butler v. St. Paul & D. R. Co. 59 Minn. 135, 142, 60 N. W. 1090; 1 Dunnell, Minn. Dig. § 1277. Under the proofs we hold the questions in this regard were for the jury.

Order reversed.

BROWN, C. J., and BUNN, J., not having heard the argument, took no part.

HALLAM, J.

I concur in the order granting a new trial, but do not concur as to the ground upon which the order is based.

The trial court dismissed the case on the ground that the act of plaintiff in stepping from a train in motion was forbidden by statute, and held that the violation of the statute conclusively established negligence on his part. It appears to me that this was error. Whatever may be the rule in other jurisdictions, it is well settled in this state that, where a statute or ordinance is made the basis of personal duty to secure safety, its violation is not conclusive evidence of contributory negligence, but only a circumstance to be considered in connection with all the evidence in the case. In my opinion the question of plaintiff's negligence should have been submitted to the jury. *Ericson v. Duluth & Iron Range R. Co.* 57 Minn. 26, 58 N. W. 822; *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881; *Day v. Duluth Street Ry. Co.* 121 Minn. 445, 141 N. W. 795, and the order of dismissal should be reversed on this ground.

I cannot, however, concur in the conclusion reached in the opinion that the statute mentioned does not apply to a person not a passenger, who accompanies a passenger to a railroad station. The statute makes it unlawful for "any person other than a passenger or employee to get on or off" a car while in motion. A person accompanying a passenger is neither a passenger nor employee. He is accordingly within the terms of the statute. It is said there was an intent to except from the operation of this statute persons who have a lawful right to go upon a train or who are lawfully upon it. The legislature expressed no such intent. It expressly excepted pas-

sengers and employees, and where express exceptions are made the inference is a strong one that no other exceptions were intended. *Cooke v. Iverson*, 108 Minn. 388, 397, 122 N. W. 251. Construing the language in its ordinary sense, the intent is plain to include all persons not expressly excepted.

It is true that exceptions from general terms of a statute will sometimes be implied. It has been said: "If there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are with regard to those collateral consequences void," as where a legislative act gives a man power to try all causes that arise within the Manor of Dale, yet, if a cause should arise in which he himself is a party, the act is to be construed as not to extend to that case, because it is unreasonable that any man should determine his own quarrel. 1 Blackstone, (Cooley's Ed.) 91.

This rule has been applied in this state and it has been said: "The general terms of a statute or ordinance may be subject to implied exceptions, founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences; for it must be presumed that the legislature did not intend such results." *Start, C. J.*, in *State v. Barge*, 82 Minn. 256, 84 N. W. 911; *Duckstad v. Board of Commrs. of Polk County*, 69 Minn. 202, 71 N. W. 933.

But this court has always been extremely reluctant to construe into a statute, by the application of this rule, an exception not written therein. In *Gollnik v. Mengel*, 112 Minn. 349, 128 N. W. 292, the question arose whether an exception could be made in our statute relating to descent of property, so as to exclude from its benefit an heir who had murdered his ancestor. Even in that extreme case the court refused to construe an exception into the statute. The reason was well stated in the opinion, written by Justice O'Brien, as follows:

"We are now asked to add to a clear and unambiguous statute an exception, and, while the demand in this instance appeals to every normal person's sense of justice, it would establish a rule of construction, the limitation of which no one could foresee."

In *Pirie v. Chicago Title & Trust Co.* 182 U. S. 438, 21 Sup. Ct.

906, 45 L. ed. 1171, it was said that no mere omission nor failure to provide for contingencies, which it may seem wise to have specially provided for, justifies any judicial addition to the language of a statute. And in *Maxwell v. Moore*, 22 How. 185, 16 L. ed. 251, the same court, through Catron, J., said: "Where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."

It seems to me that this case is not within the rule which justifies a court in implying exceptions not expressed in a statute. There is nothing absurd or contradictory to common reason in prohibiting any person from jumping off a moving train. If the construction placed upon this statute in the opinion be correct, then the statute, as applied to the act of getting on a car, simply prohibits acts of trespassers, which would be unlawful without any statute, and as applied to the act of jumping off a car simply means that a trespasser, after he once succeeds in getting on a car, shall ride thereon until the car comes to a full stop.

The practice of people accompanying friends and relatives to a railroad station is universal. The practice of their getting on the train is common. The practice of their remaining until the train starts is common enough, and has resulted in many disasters. A statute prohibiting such persons from getting off while the car is in motion, appears to me to be wholesome and reasonable. The prohibition of such practice is within the plain language of this statute. A court has no right to say that the prohibition of this practice should be excepted from the terms of the statute as an absurd or unjust consequence, contrary to common reason, or that such exception is demanded by the rules of public policy or the maxims of public justice.

It appears to me that neither the *West Virginia* nor the *New York* case cited is in any sense decisive of the question here involved. In the *West Virginia* case the statute construed was similar to ours, but the question was whether a shop employee was an employee within the meaning of the act, and it was held that he was. The statute in the *New York* case forbade only the act of getting on cars in motion, and the construction was affected in some measure by the

history of the legislation. Furthermore, there may be serious doubt as to the view there indicated that the boarding of a moving car is an act so "innocent and natural" that the prohibition of it should call for an implied exception in favor of any class of persons.

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**SIMON SALO v. DULUTH & IRON RANGE RAILROAD  
COMPANY.**

**JOHN MAKKYLA v. SAME.**

**WILLIAM SEMBUM v. SAME.<sup>1</sup>**

December 12, 1913.

Nos. 18,533, 18,534, 18,535—(305).

**Attorney's fees.**

The concessions made by appellants' attorney at the hearing required the court to make the amended findings and judgments in conformity therewith, and the decision must be affirmed. [Reporter.]

Plaintiffs in the three above entitled actions against the Duluth Iron Range Railroad Co. obtained from the district court for St. Louis county an order requiring Joseph De La Motte, their attorney, to render to them an account of his receipts, disbursements and charges in each of the actions; to disclose the facts in reference to any claim of lien on his part in any of the actions, and to show cause why another attorney should not be substituted in his place and why he should not turn over to plaintiffs all the papers in the cases and pay over to them such money in his hands as they were entitled to. The matter was heard by Cant, J., who made findings and ordered judgment in favor of plaintiffs. Plaintiffs' motion for a new trial was denied. From the judgment awarding De La Motte one-half of the damages, and interest, and all the costs taxed in his action in the district court and supreme court, and authorizing De La Motte to satisfy the judgment, William Sembum appealed. From the judgment awarding De La Motte as part of his fees the amount of Salo's judgment for costs and disbursements, Salo appealed. From the judgment awarding De La Motte as part of his fees the amount of Makkyla's judgment for costs and disbursements, Makkyla appealed. Affirmed.

<sup>1</sup> Reported in 144 N. W. 1134.

*J. W. Reynolds*, for appellants.

*J. De La Motte*, pro se.

PER CURIAM.

In July, 1910, fires devastated mining locations and the lands of settlers in St. Louis county near the right of way of the Duluth & Iron Range Railroad company. J. De La Motte secured contracts from a great number of fire sufferers to act as attorney for them in recovering damages from the railroad company. Suits were brought and a few thereof were tried. In January, 1913, the clients of De La Motte became dissatisfied with the result of his work and 31 of them desired a substitution of attorney. And upon an order to show cause why substitution should not be had the parties appeared before the court, a hearing or trial was had at which oral testimony was received touching the contracts between De La Motte and his clients as to fees, the work performed by the attorney, the payments received, and the disbursements made in the actions. The court made findings of fact and conclusions of law. And, as far as here material, these were that De La Motte's contract with appellant Sembum was for two-thirds of the amount recovered, and that he was entitled to that sum and also to receive out of the costs and disbursements to be thereafter taxed in the case such disbursements as the attorney had advanced for the client, and the same as to appellants Salo and Makkyla with reference to taxable disbursements, but the fees in those cases in addition to what already had been received was to be 5 per cent of the amount recovered (their actions, although tried, not then having resulted in a recovery).

The substituted attorney in June, 1913, succeeded in settling all the cases except the Sembum case, in which a verdict had been obtained which was afterwards upheld on appeal to this court. As part of the settlement of the Salo and Makkyla cases disbursements were to be taxed against the railroad company. Thereafter Sembum moved to amend the findings, by striking out that part which provides that De La Motte was entitled to two-thirds of the recovery, and for leave to try the right of the attorney to any lien for compensation, and at the same time De La Motte moved to amend the findings so that all costs and disbursements which in the meantime had been taxed in favor of Sembum, Salo, and Makkyla should be received by him. The court amended the findings as asked for by De La Motte, but also reduced the fees in the Sembum case from two-thirds to one-half of the recovery. Subsequently Sembum, Salo, and Makkyla each moved for a new trial. The motions were denied. From the judgments entered they severally appealed.

No error occurring at the trial or hearing is presented for review. The findings as amended support the judgment appealed from and these findings conform strictly to appellants' desires as expressed on the trial by their substituted attorney in these words: (Speaking of the Salo and Makkyla cases) "Well let

it go that way, then, in both of these cases. Mr. De La Motte, in any order that is made, shall have all the disbursements that may be taxed for that trial. and in the Sembum case he has all the fees and costs and disbursements that may ever be taxed; provided, of course, that he ever prevails in the suit in the Sembum case."

At the trial it was testified that the attorney's fees in all the fire cases was to be one-half of the recovery. It is entirely clear that, upon the trial, clients, attorneys and the court took for granted that the agreed attorney's fees in each case was one-half of the recovery. But in some way written contracts found their way into the record and the one with Sembum provides for an attorney's fee of two-thirds of the amount recovered. There was no contention on the trial that the contracts were either champertous or extortionate. The court was not asked to pass on any such question. On the contrary it was conceded that De La Motte was to have one-half of the Sembum verdict. It may well be that there was sufficient evidence to support a finding of champerty, had it been made, and, had there been no concessions, the evidence as it stood previous to the making thereof would have sustained the original findings as to De La Motte's share in the taxable costs and disbursements, as to each of appellants. But in view of the fact that the amended findings are precisely as the appellants, through their counsel at the trial, agreed to, we find no good reason for holding that there was any error or abuse of discretion in amending the findings or denying Sembum's motion to open up the case or in denying a new trial. We think that the concessions of appellants at the trial required the court to make the findings in the amended form. It follows that the judgments in conformity thereto must be affirmed.

Costs will be allowed in this court as if there had been but one appeal and one-third thereof to be taxed against each appellant.

Judgments affirmed.

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## STATE BOARD OF LAW EXAMINERS v. CHRISTIAN A. REINEKE.<sup>1</sup>

December 12, 1913.

No. 18,560.

**Attorney disbarred because convicted of crime.**

Attorney disbarred because of his conviction of the crime of forgery. [Reporter.]

<sup>1</sup> Reported in 144 N. W. 1134.

The State Board of Law Examiners, through its secretary, petitioned for the disbarment of the respondent because of his conviction of the crime of forgery in the second degree upon his plea of guilty.

*Eli Southworth*, for petitioner.

PER CURIAM.

Respondent Christian A. Reineke, a duly licensed and practicing attorney of this state, was on the eleventh day of October, 1913, duly convicted in the district court of Hennepin county of the crime of forgery and sentenced to imprisonment in the state prison for a term of years. Thereupon the Board of Law Examiners caused this proceeding to be instituted for his disbarment. After consideration of the record we find the allegations of the petition true. It is therefore ordered that respondent Christian A. Reineke be and he is removed from his office as an attorney and counsellor in the courts of this state, and that the license heretofore issued to him be and the same is hereby annulled.

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## STATE BOARD OF LAW EXAMINERS v. CARL A. THOEN.<sup>1</sup>

December 12, 1913.

No. 18,561.

**Attorney disbarred because convicted of crime.**

Attorney disbarred because of his conviction of the crime of forgery. [Reporter.]

The State Board of Law Examiners, through its secretary, petitioned for the disbarment of the respondent because of his conviction of the crime of forgery in the second degree upon his plea of guilty.

*Eli Southworth*, for petitioner.

PER CURIAM.

Respondent Carl A. Thoen, a duly licensed and practicing attorney of this state, was on the eleventh day of October, 1913, duly convicted in the district court of Hennepin county of the crime of forgery and sentenced to imprisonment in the state reformatory for a term of years. Thereupon the Board of Law Examiners caused this proceeding to be instituted for his disbarment. After consideration of the record we find the allegations of the petition true. It is there-

<sup>1</sup> Reported in 144 N. W. 1135.

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fore ordered that respondent Carl A. Thoen be and he is removed from his office as an attorney and counsellor in the courts of this state, and that the license heretofore issued to him be and the same is hereby annulled.

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HENRY E. KLEIN v. W. & D. RAILROAD, WAREHOUSE & STORAGE COMPANY.<sup>1</sup>

December 26, 1913.

Nos. 18,293—(163).

**Vacating judgment.**

The trial court did not err in refusing to open a default judgment, where the proposed answer and defendant's affidavit showed neither frankness nor merit in the application to open. [Reporter.]

From an order of the district court for Ramsey county, Catlin, J., denying defendant's motion to vacate a default judgment and for leave to interpose an answer, it appealed. Affirmed.

*Louis L. Schwartz*, for appellant.

*James E. Markham* and *Benjamin Calmenson*, for respondent.

**PER CURIAM.**

Appeal from an order refusing to open a default judgment. Defendant was personally served with summons in an action for conversion, but instead of serving an answer wrote a letter to plaintiff's attorney denying liability; the attorney answered asking for some information which was furnished. Had defendant presented meritorious defense the court would no doubt have opened the judgment. Defendant came into the possession of plaintiff's goods, as far as the showing goes, rightfully, but, considering the affidavit used by defendant on the motion, the sale of the property by it appears to have been unlawful. It claims to be a licensed storage company and as such, under section 6075, G. S. 1913, received the goods from a common carrier. The exhibits attached to the affidavit show the goods to have been shipped from Boston in December, 1911, therefore defendant must have received them from the common carrier subsequent thereto. It sold them the following April. Section 6077, G. S. 1913, does not authorize a sale until one year after receipt of the property by the storage company. The proposed answer was a general denial. Taking the an-

<sup>1</sup> Reported in 144 N. W. 1134.

swer and the affidavit together we are clear that defendant has neither shown frankness nor merit in the application to open the judgment.

Order affirmed.

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MARTIN PETCOFF and Others v. ST. PAUL CITY  
RAILWAY COMPANY.<sup>1</sup>

December 26, 1913.

Nos. 18,315—(162).

**Joinder of causes of action.**

Causes of action against more than one defendant, based upon concurrent negligence of all of them, where the facts are identical as to time, place and result in causing decedent's death, may be united. [Reporter.]

Action in the district court for Ramsey county by the administrators of the estate of Nicholas Jordanoff, deceased, to recover \$7,500 for the death of their intestate. From an order, Dickson, J., overruling the separate demurrer of defendant St. Paul City Railway Company to the complaint, it appealed. Affirmed.

*W. D. Dwyer*, for appellant.

*Schmidt & Waters* and *Gustavus Loevinger*, for respondents.

**PER CURIAM.**

Action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendants. The railway company appealed from an order overruling its separate demurrer to the complaint, interposed upon the ground that two causes of action were improperly joined.

The facts alleged concerning the negligence of both defendants are identical as to time, place, and result in causing decedent's death; and hence present causes of action based upon concurrent negligence, which may be united. Appellant's contentions to the contrary are ruled adversely in *Mayberry v. Northern Pacific Ry. Co.* 100 Minn. 79, 110 N. W. 356; *Fortmeyer v. National Biscuit Co.* 110 Minn. 158, 133 N. W. 461, and *Jackson v. Orth Lumber Co.* 121 Minn. 461, 141 N. W. 518.

Order affirmed.

<sup>1</sup> Reported in 144 N. W. 474.

SULLIVAN LUMBER COMPANY v. EDNA THORN.<sup>1</sup>

December 26, 1913.

Nos. 18,367—(226).

**New trial.**

Action on promissory note. Counterclaim for services. Substantial verdict in favor of defendant. New trial granted, because due weight was not given to the presumption arising from the giving of the note and the verdict was not justified by the evidence. [Reporter.]

Action in the district court for Traverse county to recover \$159.20 upon a promissory note. The case was tried before Flaherty, J., and a jury which returned a verdict in favor of defendant for \$330.50. From an order denying plaintiff's motion for a new trial, it appealed. Reversed and new trial granted.

*D. J. Leary*, for appellant.

*F. W. Murphy*, for respondent.

**PER CURIAM.**

Plaintiff brought action on a promissory note. Defendant admitted the note, but counterclaimed the value of services alleged to have been rendered to plaintiff. She recovered a verdict of \$330.50. The only question in the case is, does the evidence sustain this verdict. We have examined the evidence in this case with care. A majority of the court are of the opinion that due weight was not given to the presumption arising from the giving of the note (*Beneke v. Beneke*, 119 Minn. 441, 138 N. W. 689), and that the verdict is not justified by the evidence, and that a new trial should be granted.

Order reversed and new trial granted.

STATE v. WALTER M. TOOLE.<sup>2</sup>

December 26, 1913.

Nos. 18,457—(3).

**Certified case.**

Where a case is certified to this court under G. S. 1913, § 9251, the proceeding

<sup>1</sup> Reported in 144 N. W. 1135.

<sup>2</sup> Reported in 144 N. W. 474.

is purely statutory, and the court has no jurisdiction unless it is within the statute. There is no warrant for certifying questions that have arisen upon a trial in which the jury disagreed. [Reporter.]

Defendant was indicted by the grand jury of Clay county for the crime of selling intoxicating liquor to a minor, tried in the district court for that county before Nye, J., and a jury who disagreed, and the case was certified to this court under G. S. 1913, § 9251. Dismissed.

*Lyndon A. Smith*, Attorney General, and *Christian C. Dosland*, County Attorney, for plaintiff.

*Charles S. Marden*, *N. I. Johnson* and *James M. Witherow*, for defendant.

**PER CURIAM.**

Defendant was indicted on the charge of selling liquor to a minor. He was tried and the jury disagreed. Thereupon the trial court, proceeding under G. S. 1913, § 9251, certified to this court certain questions of law arising upon rulings made during the course of the trial and upon portions of the charge to the jury, and requested the opinion of this court upon said questions.

This proceeding is purely statutory. If the proceeding is not one within the statute, no jurisdiction is conferred upon this court. The statute provides for certifying to this court questions arising "upon the trial of any person convicted in any district court, or \* \* \* upon any demurrer or special plea to an indictment, or upon any motion upon or relating thereto." There is no warrant for certifying questions that have arisen upon a trial in which the jury disagreed. This court has acquired no jurisdiction of the case. *State v. Billings*, 96 Minn. 533, 104 N. W. 1150. The proceeding is accordingly dismissed.

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## RAILROAD AND WAREHOUSE COMMISSION v. GREAT NORTHERN RAILWAY COMPANY.<sup>1</sup>

January 9, 1914.

Nos. 18,225—(25).

**Removal of station building.**

The Railroad and Warehouse Commission has authority in a proper case to

<sup>1</sup> Reported in 144 N. W. 771.

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Note.—On the question of the right to change location of railroad station, see note in 34 L.R.A.(N.S.) 412. And upon the power to compel stopping of trains at stations, see notes in 17 L.R.A.(N.S.) 821 and 29 L.R.A.(N.S.) 159.

order defendant to remove its station building one-half mile from its present location up to the village which it serves. [Reporter.]

**Compelling trains to stop at junction.**

Where defendant has failed to stop its trains before passing a junction not provided with an interlocking device, thereby violating the statute (G. S. 1913, § 4406), the Railroad and Warehouse Commission has the right to order such trains to be brought to a stop before the junction, until some other sufficient provision has been made to avoid the danger of collision. [Reporter.]

From an order of the Railroad and Warehouse Commission requiring the Great Northern Railway Co. to remove the station building in Brook Park to a certain specified location, and that the company immediately comply with the law by bringing all trains to a full stop before reaching the railroad junction, the railway company appealed to the district court for Pine county. The appeal was heard before Stolberg, J., who at the close of the evidence denied defendant's motion to overrule the order, made findings, and ordered judgment directing the station building to be moved and that the railway company bring all trains to a full stop before reaching the railroad junction. From an order denying its motion for a new trial, the railway company appealed. Affirmed.

*J. A. Murphy and M. L. Countryman*, for appellant.

*Lyndon A. Smith*, Attorney General, *Alonzo J. Edgerton*, Assistant Attorney General, and *J. W. Bennett*, for respondent.

**PER CURIAM.**

The station building of the Great Northern Railway at Brook Park is located about one-half mile from the village. After a hearing at which both the railway company and the residents of the village were represented, the Railroad and Warehouse Commission ordered the company to move the station building up to the village. The company appealed therefrom to the district court, which, after a trial, directed judgment in accordance with the order of the commission. A motion for a new trial was made and denied and the company appealed to this court.

There is no doubt of the authority of the commission to make such order in a proper case. Sections 4178, 4239, G. S. 1913; 2 Dunnell, Minn. Dig. § 8124. As in *State v. Great Northern Ry. Co.* 123 Minn. 463, 467, 144 N. W. 155: "The question as to what accommodations are reasonably necessary to afford proper transportation facilities to the public is legislative or administrative, and not judicial, in its nature; and the courts can interfere with the action of the body intrusted with the power and duty to determine such questions only when such action oversteps the limitations, constitutional or otherwise, placed upon the exercise of such power." Under the rule governing such cases, the evidence

submitted will not justify this court in annulling the action of the commission and of the trial court.

Both the commission and the trial court found in effect that Brook Park is a junction point between two lines of railway operated by defendant; that there is no interlocking device at this junction; that, as to trains which do not stop at Brook Park, the company has been violating section 4406, G. S. 1913, which requires all trains to come to a stop before passing a junction not provided with an interlocking device rendering such stop unnecessary; and directed that such trains be brought to a stop before passing this junction. This requirement is proper, until it appears that some other sufficient provision has been made to avoid the danger of collisions.

Order affirmed.

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DR. SHOOP FAMILY MEDICINE COMPANY v. THERESA  
OPPLIGER.<sup>1</sup>

January 9, 1914.

Nos. 18,266—(139).

**Vacating judgment.**

Application to open a default judgment for the price of medicines sold to defendant's husband upon his written order. The summons was served in October and judgment was entered in the succeeding February. The affidavit in support showed a prior judgment against the husband for the same bill; defendant's delivery of the summons to her husband in October and reliance on him to take proper steps to protect her; belief on his part that a second judgment could not be entered for the same bill; and defendant's absence from the state until the spring, when she first learned of the judgment, and no interest on defendant's part in the drug store run by her husband. *Held*: The court did not abuse its discretion in permitting defendant to answer, and permitting the judgment to stand as a lien against her property until the result of a trial of the issues. [Reporter.]

Same.

It is the duty of the courts to relieve a party from default, if he furnishes any reasonable excuse for his neglect and shows a defense of fair merit, no substantial prejudice appearing to the other side from the delay. [Reporter.]

<sup>1</sup> Reported in 144 N. W. 743.

Appeal by plaintiff from an order of the district court for Roseau county permitting a judgment entered by default against defendant to be opened, and allowing her to make her defense in the same and serve an answer thereto. Affirmed.

*Alexander Fosmark, Charles Loring and G. A. Youngquist, for appellant.*

*E. M. Stanton and H. C. Rowberg, for respondent.*

PER CURIAM.

Suit to recover the price for a bill of goods sold in 1908. Personal service of summons in October, 1912. Judgment by default entered in February following, and in May thereafter defendant applied to have the default opened and for leave to answer. The court permitted the answer but let the judgment, which was a lien on defendant's real estate, stand to abide the result of a trial. Plaintiff appeals.

The affidavit supporting the application and the proposed answer tend to show a meritorious defense. In December, 1908, suit was brought by plaintiff against defendant and her husband upon the same cause but was afterwards dismissed. In June, 1912, Dr. Shoop's Laboratories, Inc. sued the husband alone for the same bill and obtained judgment. When served, defendant gave the summons to her husband and relied upon him to take the proper steps to protect her. He appears to have labored under the impression that no judgment could be entered against his wife after judgment obtained against him. Defendant was not in good health and left the state shortly after the summons was served and claims she knew nothing about the judgment till she returned in the spring. She further shows that the goods for the price of which the suit is brought were bought upon the written order signed by her husband, that she had no interest in the drug store run by him for which the goods were purchased. This is in a measure contradicted. But apparently a strong case of a meritorious defense is presented.

The order must stand unless there was an abuse of discretion. In *Altmann v. Gabriel*, [28 Minn. 132, 9 N. W. 633] the order opening the default was reversed mainly because of an unexcused delay of almost a year after knowledge of the judgment. The absence of an affidavit of merits resulted in a reversal of an order opening the default in *People's Ice Co. v. Schlenker*, 50 Minn. 1, 52 N. W. 219. *McClure v. Clarke*, 94 Minn. 37, 101 N. W. 951, presented no excuse whatever, and the delay was two years. *Hoffman v. Freimuth*, 101 Minn. 48, 111 N. W. 732, was an application made after expiration of a year from knowledge of the entry of judgment. The case of *John T. Noye Mfg. Co. v. Wheaton Roller-Mill Co.* 60 Minn. 117, 61 N. W. 910, must be regarded as extreme when the ground upon which it is placed is considered. It should not be further extended. *Walsh v. Boyle*, 94 Minn. 437, 103 N. W. 506.

It is the duty of the courts to relieve a party from default, if he furnishes any reasonable excuse for his neglect and shows a defense of fair merit, no substantial prejudice appearing to the other side from the delay. 2 Dunnell, Minn.

Dig. § 5013; *McMurren v. Bourne*, 81 Minn. 515, 84 N. W. 338; *Barrie v. Northern Assurance Co.* 99 Minn. 272, 109 N. W. 248. *Clifford v. Great Northern Ry. Co.* 118 Minn. 22, 136 N. W. 260, also disposes of the point that there was no sufficient affidavit of merits.

Order affirmed.

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STATE *ex rel.* PAULINE BISSEBERG *v.* I. M. OLSEN.<sup>1</sup>

January 9, 1914.

No. 18,591.

**Approval of "case" — discretion of court.**

Application to a trial court to allow and sign a settled "case" after the expiration of the time fixed therefor by a stay of proceedings is addressed to its sound discretion. *Held*: In this case it did not abuse such discretion in denying the application. [Reporter.]

On the petition of Pauline Bisseberg this court issued its order directing Honorable I. M. Olsen, as judge of the district court for Lyon county, to show cause why a peremptory writ of mandamus should not issue commanding him to make and enter an order giving her leave to propose and serve a bill of exceptions in a certain action in the district court entitled *Gifford v. Bisseberg*. The return of the respondent stated, among other matters, that the denial of petitioner's motion for leave to propose and serve a bill of exceptions was, among other things, made on December 17, 1913, for the reason that it appeared to the court that the defendant and her attorneys had failed to use any reasonable diligence or failed to show any good cause why such leave should be granted more than six months after the trial of the cause and more than three months after the entry of judgment therein. Order to show cause discharged.

*George B. Leonard*, for petitioner.

*James H. Hall*, for respondent.

**PER CURIAM.**

Order to show cause why the trial court should not allow and sign a settled case after the expiration of the time fixed therefor by a stay of proceedings. The court had the power to grant the relief, but the application was addressed to its sound discretion. The facts presented to this court will not justify the conclusion that the court abused its discretion in denying the relief, and the order to show cause is therefore discharged.

<sup>1</sup> Reported in 144 N. W. 755.



**A. F. EDWARDS v. B. B. SMITH.<sup>1</sup>**

January 16, 1914.

Nos. 18,360—(191).

**Ejectment.**

Action in ejectment. The answer admitted plaintiff was the owner of the land, but that defendants were rightfully in possession under a lease from plaintiff's grantor. The supplemental answer alleged that, after the original answer was served, plaintiff took and was in the actual possession of the premises, and neither defendant was in possession of any part of the land, and prayed for a dismissal of the action. *Held*: The supplemental answer entitled plaintiff to judgment on the pleadings. The questions raised were moot questions. [Reporter.]

Action in the district court for Meeker county. The facts are stated in the opinion. The case was tried before Powers, J., who denied plaintiff's motion for judgment on the pleadings, made findings and ordered judgment in favor of plaintiff. From an order denying defendant B. B. Smith's motion for a new trial, he appealed. Affirmed.

*Ray H. Dart* and *Albert F. Foster*, for appellant.

*N. D. & C. H. March* and *Alva R. Hunt*, for respondent.

**PER CURIAM.**

Action in ejectment for the recovery of 80 acres of land in Meeker county. The complaint was in the usual form, alleging ownership in plaintiff, and that defendants unlawfully retained possession. The answer admitted that plaintiff was the owner of the land, but claimed that defendants were rightfully in possession under a lease from plaintiff's grantor. The reply admitted this lease, but alleged that it contained a provision that, in case of a sale of the premises, the sale would cancel the lease, and that defendants would surrender the premises on 30 days' written notice. It further alleged that this notice had been duly given. A supplemental answer alleged that, after the original answer was served, plaintiff took possession of the premises, and "is now in the actual possession and occupation of the whole of the same, and that neither of the defendants is now in the possession of any part of the said lands. Wherefore the defendants ask the judgment of the court that the plaintiff take nothing by this action, that the action be dismissed and that the defendant recover of the plaintiff their costs and disbursements herein."

The trial was by the court without a jury. The decision was that the action

<sup>1</sup> Reported in 144 N. W. 1090.

should be dismissed upon the merits as to defendant Marcia Smith, that plaintiff was the owner and entitled to the possession of the land, and that defendants have no right, title or interest therein by virtue of the lease. Defendant B. B. Smith moved for a new trial. The motion was denied and he appealed.

The first assignment of error is that the court erred in refusing to dismiss the case on the ground that it appeared from the pleadings that plaintiff was already in possession of the lands. It is true that it appeared from the supplemental answer that plaintiff had taken possession after the action was brought, but this answer did not ask a dismissal upon this ground, nor did defendant offer to let plaintiff have judgment determining her right to possession. He demanded, on the contrary, a judgment in his favor on the merits, with costs. We are unable to hold that it was error not to dismiss the case.

We are of the opinion, however, that the supplemental answer in effect admitted plaintiff's right to possession, and entitled her to a judgment on the pleadings. It does not allege that plaintiff took possession by force or wrongfully, and, from the nature of defendant's occupancy of the premises, it is difficult to see how plaintiff could have acquired possession except by the voluntary act of defendant. If defendant relinquished possession voluntarily, it is difficult to see what issue there was for trial in the case. Admittedly plaintiff was the owner of the land and entitled to possession, except for defendant's rights under his lease. The questions raised as to the admissibility and effect of the provision of the lease written after the signatures, as to the validity of the notice, and as to admitting in evidence certain depositions, are therefore moot questions, and we decline to consider or decide them. It may be noted also that the lease will expire by lapse of time in less than two months.

Order affirmed.

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GEORGE D. ROGERS and Others v. COUNTY OF  
HENNEPIN and Others.<sup>1</sup>

January 23, 1914.

Nos. 18,394—(250).

**Case followed.**

Action in the district court for Hennepin county against the county of Hennepin and its treasurer and auditor, officially and individually, to restrain defendants from enforcing assessments for taxation upon memberships in the chamber of commerce of Minneapolis, incorporated under Laws 1883, c. 138, and to enjoin defendants from enforcing the same. Defendant's demurrer to the complaint was sustained, Hale, J. Defendants' motion for judgment upon all the

<sup>1</sup> Reported in 145 N. W. 112.

files and records that plaintiffs take nothing by the action was granted. From the judgment entered pursuant to the order for judgment, plaintiffs appealed. Affirmed.

*Mercer, Swan & Stinchfield*, for appellant.

*James Robertson and R. S. Wiggin*, for respondents.

PER CURIAM.

This action was brought to cancel all assessments of taxes on memberships in the Minneapolis Chamber of Commerce, and to restrain their enforcement. The trial court sustained a demurrer to the complaint and denied a temporary injunction. A motion by defendants for judgment was granted and judgment was entered in favor of defendants. Plaintiffs appealed from this judgment.

The case was submitted on briefs in this court with *State v. McPhail*, *supra*, page 398, 145 N. W. 108. The decision in that case controls this.

Judgment affirmed.

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ANNA HYLAND TIERNEY v. MODERN WOODMEN OF AMERICA.<sup>1</sup>

February 6, 1914.

Nos. 18,411—(231).

Case followed.

Action in the district court for Hennepin county to recover \$2,000 upon defendant's policy of insurance upon the life of John Hyland, in favor of plaintiff, his daughter. The case was tried before Booth, J., who made findings of fact and ordered judgment in favor of defendant. From an order denying her motion for amended findings of fact and from an order denying a new trial, plaintiff appealed. Affirmed.

*J. L. Murphy and Thomas B. Kilbride*, for appellant.

*Benjamin S. Smith and Elijah Barton*, for respondent.

PER CURIAM.

This case involves the same certificate considered in *Hughes v. Modern Woodmen of America*, *supra*, page 458, 145 N. W. 387. Plaintiff, the daughter of the assured, brought this action in the district court of Hennepin county to recover thereon. The trial court found that she was not the beneficiary thereunder and directed judgment for defendant. She made a motion for a new trial which was denied, and she appealed. The case is controlled by the decision in the *Hughes* case and the order appealed from is affirmed.

<sup>1</sup> Reported in 145 N. W. 390.

NELS J. THYSELL and Others v. HALVOR O. HOLM.<sup>1</sup>

February 6, 1914.

Nos. 18,421—(228).

**Extension of note — consideration.**

An extension of a promissory note which will release a nonconsenting surety must, like any other contract, be based upon a consideration. A promise by a debtor to pay a past-due debt is not a legal consideration. [Reporter.]

Action in the district court for Clay county to recover \$243.65 upon two promissory notes. The case was tried before Taylor, J., who granted plaintiffs' motion for a directed verdict. From an order denying his motion for a new trial, defendant appealed. Affirmed.

*Christian G. Dosland*, for appellant.

*W. George Hammett*, for respondent.

**PER CURIAM.**

Suit on two promissory notes executed by father and son. The father alone answered, alleging as a defense that he was a surety and that plaintiffs with knowledge of that fact, for a valuable consideration, extended the time of payment to the son without the consent of the father. The court directed a verdict for plaintiffs. The appeal is from the order denying a new trial.

After the maturity of the notes, the son was asked to pay a past-due book account which he owed plaintiffs. He testified that plaintiffs threatened to bring suit against the makers of the notes, unless he paid this book account, and thereupon he agreed to pay the account, if plaintiffs would extend the time of payment of the notes until the following fall. He claims plaintiffs accepted his promise, which he kept by thereafter paying or adjusting this book account. An extension of the time of payment of a promissory note which will release a nonconsenting surety must, like any other contract, be based on a consideration. The sole consideration as disclosed by appellant's evidence was the promise of the son to pay a past-due debt. This was not a consideration in a legal sense. He promised no more than he was already obligated to do. *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; *Hughes v. Southern Warehouse Co.* 94 Ala. 613, 13 South. 133; *Ingels v. Sutliff*, 36 Kan. 444, 13 Pac. 828; *Bunker v. Taylor*, 10 S. D. 526, 74 N. W. 450; *Jennings v. Chase*, [10 Allen] 92 Mass. 526; *First State Bank of Montgomery v. Schatz*, 104 Minn. 425, 116 N. W. 917. Order affirmed.

<sup>1</sup> Reported in 145 N. W. 164.



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**ABANDONMENT.** See **MUNICIPAL CORPORATION**, 17.

A perfect legal title to real estate is never lost by abandonment.

—*Krueger v. Market*, 394.

**ACCOMPLICE.** See **CRIMINAL LAW**, 1.

**ACTION.** See **CANCELATION OF INSTRUMENT**; **CORPORATION**, 2; **DEATH BY WRONGFUL ACT**, 1, 2; **DRAIN**, 4, 6; **EQUITY**, 1; **FRAUD**, 1-3; **INJUNCTION**, 2; **JOINER**; **MORTGAGE**, 5; **PRINCIPAL AND AGENT**, 1, 2; **SALE**, 4; **TORT**.

## COMMENCEMENT OF ACTION.

1. An action is deemed as commenced when the summons is delivered to the proper officer for service, if such service be completed within the prescribed time.

—*Bond v. Pennsylvania Railroad Co.* 196.

## SAME—AGAINST NONRESIDENT.

2. Whatever uncertainty may have resulted from sections 13, 14, 42, 49 and 54, c. 66, G. S. 1866, in the case of a nonresident who had never had a place of residence nor a place of business within the state, was removed in the revision of 1905, which provides that the action shall be considered as begun when the summons "is delivered to the proper officer" for service. R. L. 1905, § 4081. The proper officer is the officer who in the particular case is the proper official to make such service. In the case of nonresidents such officer is the sheriff of the county in which the action is begun. R. L. 1905, § 4111.

—*Bond v. Pennsylvania Railroad Co.* 201.

3. The expression "for the purposes of this subdivision" found in R. L. 1905, § 4081, does not limit the provisions of section 4081 to those sections of the Code of Civil Procedure which the editor of R. L. 1905, might thereafter see fit to group with this section under some common headline. The subdivision referred to must be a subdivision of the act

## ACTION—Continued.

itself or that subdivision of the subject-matter of the act to which the section relates. The subdivision of the revised laws in which the section is found is chapter 77, which is the code of civil procedure; and the subject-matter to which it relates is the bringing of civil actions and the time at which they shall be deemed to have been begun.

—Bond v. Pennsylvania Railroad Co. 202.

BAR TO ACTION.

See JUDGMENT, 5.

ADMISSION. See EVIDENCE, 4, 5; WILL, 6.

## ADOPTION.

BY CONTRACT.

1. Evidence considered, and *held* to show that a child, unrelated to intestate by blood, was taken into the latter's home under an agreement by her and her husband to make such child their child and heir, which agreement was evidenced by writing subsequently lost.

—Fiske v. Lawton, 85.

VALIDITY OF CONTRACT.

2. The contract was valid in Ohio, where it was made, and when executed, the deceased dying intestate, it entitled the child, pursuant to the equitable maxim that equity regards that as done which ought to be done, to the same share in decedent's estate as a natural child; the remedies thereunder being governed, however, by our laws.

—Fiske v. Lawton, 86.

3. Courts of equity have enforced contracts like the one alleged whether oral or written, with respect to property rights involved. This rule has been followed in New Jersey and many other jurisdictions, without statutory authority. The great weight of authority is that such contracts are not unlawful or against public policy.

—Fiske v. Lawton, 89, 90.

4. Decedent voluntarily entered into the contract and pursuant thereto received, during her life, the benefits of the relation thereby created, the services, society, affection and devotion, of an adopted daughter made her own. No principle of law or equity requires a holding that respondent can avail herself of technical objections to the child's status, the validity of which so far as appears remained undisputed by deceased, after full performance of the contract.

—Fiske v. Lawton, 89.

## ADOPTION—Continued.

## EVIDENCE.

5. Proofs necessary to establish such agreements must be clear, positive, and convincing in all particulars; relief should be cautiously granted; and each case must rest on its own facts.

—Fiske v. Lawton, 85.

## CONSENT OF PARENT.

6. Absence of the child's father's consent to the "adoption" held, under the circumstances of the case, not available to the legal heir of intestate for the purpose of defeating the child's rights under the contract.

—Fiske v. Lawton, 85.

## INHERITANCE BY HEIR OF ADOPTED CHILD.

7. Upon the child's death, leaving lawful issue, the latter inherited through her a share in the estate of the deceased "adopting" parent as if she, the "adopted" child, had been a daughter by blood.

—Fiske v. Lawton, 86.

## ADVERSE POSSESSION. See BOUNDARY, 1; TRIAL, 13.

## MUST CONTINUE 15 YEARS.

1. To establish title to real estate by adverse possession, such possession must be shown for the full statutory period of 15 years.

—Krueger v. Market, 393.

## CHARACTER OF ADVERSE ACTS.

2. To constitute adverse possession, the possessory acts must appear upon the land itself and be such as to indicate an intention to appropriate it permanently. Giving permission to a third party to cut hoop poles thereon and receiving pay for such poles is not sufficient to establish such possession.

—Krueger v. Market, 394.

3. The character of the adverse possession is not very persuasive. Plaintiff never joined any fence to the fence built by defendants; never cultivated up to the fence, and the cutting of grass on the small patches of marsh or meadow did not occur every year. Plaintiff used his adjoining land as a wood lot, but there is no evidence that he cut any trees on the strip in dispute, except that he testified he showed his attorney some large maple stumps from trees cut five or six years before the trial. Surely title by adverse possession does not appear conclusively.

—Roy v. Dannehr, 237.

124 M.—35.



## ADVERSE POSSESSION—Continued.

## PAYMENT OF TAXES.

4. The payment of taxes, although evidence of a claim of title, is not evidence of adverse possession.

—Krueger v. Market, 394.

AGRICULTURE. See EMINENT DOMAIN, 5.

AMBIGUITY. See STATUTE, 13; WORDS AND PHRASES, 1.

APPEAL AND ERROR. See CERTIFIED CASE; COSTS, 6; EQUITY, 2; JUSTICE OF THE PEACE, 3.

## WHEN APPEAL CAN BE TAKEN—COSTS AND DISBURSEMENTS.

1. An appeal lies from a judgment involving only the costs and disbursements where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount.

—Salo v. Duluth & Iron Range Railroad Co. 361.

## NOTICE OF APPEAL.

2. The appeal is from the judgment and is not rendered ineffective by the reference in the notice of appeal to nonappealable orders, or to the items claimed to have been erroneously omitted from the judgment.

—Salo v. Duluth & Iron Range Railroad Co. 361.

## RETURN ON APPEAL—CORRECTION OF MISTAKE.

3. The authenticated return of a cause by the trial judge cannot be questioned in this court on appeal, but we are required to accept such return as a verity. The only method of correcting mistakes in the bill of exceptions or settled case certified here by the proper authority is in a direct proceeding by mandamus to secure a further return.

—State v. O'Hagan, 62.

4. Objection to amendment of the settled case *held* insufficient to present the question whether such would be precluded after perfection of the appeal.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

## ASSIGNMENT OF ERROR.

5. Where a motion for a new trial is based upon several grounds, an assignment of error that the court erred in denying the motion, without specifying the ground upon which it is claimed the motion should have been granted, is insufficient.

—J. G. Cherry Co. v. Larson, 251.

APPEAL AND ERROR—Continued.

MOTION TO DISMISS APPEAL.

See JUDGMENT NOTWITHSTANDING VERDICT.

RECORD.

See CRIMINAL LAW, 13.

REVIEW.

See CONSTITUTION, 1.

DISCRETION OF TRIAL COURT.

6. Application to a trial court to allow and sign a settled "case" after the expiration of the time fixed therefor by a stay of proceedings is addressed to its sound discretion. *Held*: In this case it did not abuse such discretion in denying the application.

—State ex rel. v. Olsen, 537.

HARMLESS ERROR.

7. That a rule of procedure may have been violated is not a sufficient ground for reversing a trial, unless prejudice resulted therefrom to the party complaining.

—Tuttle v. Farmer's Handy Wagon Co. 209.

8. In a personal injury action the court charged that the Federal Employer's Liability Act changed the common-law rule in the matter of contributory negligence by providing that when plaintiff is guilty of negligence which is a proximate cause of the accident, he will be entitled to recover a proportionate amount of the total injury sustained, that is, a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant. *Held*: The charge was technically erroneous, but not prejudicial.

—Skaggs v. Illinois Central Railroad Co. 503.

SAME—LIMITING PEREMPTORY CHALLENGES.

9. Limiting the number of peremptory challenges to three for both defendants, even if erroneous, does not entitle appellant to a reversal unless it appear that appellant was not permitted to exercise all three challenges and that some juror remained upon the panel whom appellant wished to exclude therefrom. In this case the objecting defendant did not accept plaintiff's offer to recall the jurors for defendant to strike additional names.

—Tuttle v. Farmer's Handy Wagon Co. 204, 209.

## APPEAL AND ERROR—Continued.

## SAME—ADMISSION OF EVIDENCE.

10. Where a fact is proven by uncontroverted testimony, the reception of some testimony in the nature of legal conclusions to prove the same fact is not reversible error.

—Ludowese v. Amidon, 288.

11. Evidence upon the affirmative defense of a valid expulsion of a member. after hearing, for certain offenses against the order, including misrepresentation of age, being such that the court would have been justified in charging failure to establish it, and this being the only issue submitted, and there being no other proper to be submitted, admission of testimony tending to refute the charge of such misrepresentation was without prejudice to defendant, though irrelevant.

—Kulberg v. National Council of Knights and Ladies of Security, 438.

## SAME—EXCLUSION OF EVIDENCE.

12. It was not prejudicial error to sustain objections to questions calling for declarations of the deceased to the effect that he intended not to pay assessments in the future.

—Ruder v. National Council of Knights and Ladies of Security, 432.

## EVIDENCE.

See CARRIER, 2; HABEAS CORPUS, 3.

13. The question of public necessity in the laying out of a street is legislative and to be determined by the tribunal to which it is delegated. The authority of the court in the review of such determination is limited to the inquiry whether the evidence upon the question is practically conclusive that no public necessity exists for the improvement.

—Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy, 110.

14. Defendants' negligence and plaintiff's contributory negligence were for the jury, and their verdict, approved by the court, is fairly supported by the evidence. It is not based on demonstrably false testimony.

—Bolstad v. Armour & Co. 155.

## MOTION FOR NEW TRIAL.

15. Where a trial court makes a general order granting a new trial on the ground that the verdict is not justified by the evidence, such order will not be reversed unless the evidence is manifestly and palpably in favor

**APPEAL AND ERROR—Continued.**

of the verdict. Applying this rule to the evidence in this case, the order appealed from should be affirmed.

—Weiss v. Peterson, 84.

16. Where a motion for judgment notwithstanding the verdict in favor of plaintiff is denied, but one for a new trial is granted, the only question on appeal is whether there was evidence to take the case to the jury. Where a motion for a new trial has been granted, the court cannot consider alleged errors in the admission of evidence or the sufficiency of the evidence to sustain the verdict.

—Swadner v. Schefcik, 270.

**QUESTION OF AMOUNT OF DAMAGES—GRANT OF NEW TRIAL.**

17. Where error in the case bears only on the question of the amount of damages, a new trial may be granted upon that issue alone. Where defendants' testimony admits a certain amount, plaintiff may be given the option of accepting that amount in preference to taking a new trial.

—Stevens v. Wisconsin Farm Land Co. 421.

18. The reason for giving special weight to the opinion of the trial judge and jury in the matter of damages in appeals in actions for personal injury does not apply in the case of appeals in proceedings in eminent domain.

—Potts v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 416.

19. The concessions made by appellants' attorney at the hearing required the court to make the amended findings and judgments in conformity therewith, and the decision must be affirmed.

—Salo v. Duluth & Iron Range Railroad Co. 526.

**APPEARANCE. See JUSTICE OF THE PEACE, 2.****ARSON. See CRIMINAL LAW, 10.**

Evidence examined, and held sufficient to sustain a verdict of arson in the third degree.

—State v. O'Hagan, 58.

**ASSAULT AND BATTERY. See DAMAGES, 10, 13; PLEADING, 3; TRIAL, 5; WITNESS, 6.**

Where, in a civil action for assault and battery, no question arises as to which party was the aggressor, and the issue is defense of self or property, plaintiff's reputation for turbulence or violence, uncommunicated to defendant, is inadmissible.

—Campbell v. Aarstad, 284.

ASSESSMENT FOR LOCAL IMPROVEMENT. See CONSTITUTION, 5; MUNICIPAL CORPORATION, 12; TAXATION, 9-15.

ASSIGNMENT.

ASSIGNMENT OF DEBT.

1. One who has contracted to perform certain specified work may assign his claim for the compensation to be received therefor before the work has been completed. The assignee of course can recover only the amount to which the assignor becomes entitled under his contract.

—Leonard v. Farrington, 160, 162.

ASSIGNMENT OF CONTRACT.

2. One party to a contract cannot assign his part of the contract to the other party, and still have the contract remain in force.

—Itasca Cedar & Tie Co. v. McKinley, 187.

ASSIGNMENT OF CONTRACT TO MANUFACTURE MATERIAL.

3. Plaintiff in replevin claimed title under certain contracts of sale. Under the first contract one of defendants agreed to manufacture and deliver to plaintiff certain timber products. It is conceded that no title passed under this contract. Defendant proceeded to fulfil the contract, manufacturing part of the material himself and procuring part to be manufactured by others. Later a second contract was made, by the terms of which defendant assigned to plaintiff "all interest in all contracts he has of every nature and description for the manufacture and sale of material of the kinds mentioned in said (first) contract." *Held*, that this did not operate to assign to plaintiff the contract between plaintiff and defendant, and did not pass title to material in process of manufacture by defendant himself.

—Itasca Cedar & Tie Co. v. McKinley, 183.

NEGLECT TO FILE ASSIGNMENT OF DEBT.

4. Failure to file the assignment of a debt as provided by section 7017, G. S. 1913, does not render such assignment absolutely void, but casts upon the assignee the burden of proving that it was made in good faith and for a valuable consideration.

—Leonard v. Farrington, 160.

EVIDENCE.

5. Evidence examined, and *held* to sustain the findings and decision of the trial court.

—Leonard v. Farrington, 160.

**ASSUMPTION OF RISK.** See **MASTER AND SERVANT**, 22-25; **NEGLIGENCE**, 5.

**ATTACHMENT.**

A preferential transfer or payment, without actual fraud, does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize the issuance of a writ of attachment, under R. L. 1905, § 4216 (G. S. 1913, § 7846).

—*Crookston State Bank v. Lee*, 112.

**ATTORNEY AND CLIENT.**

Attorney disbarred because of conviction of the crime of forgery.

—*State Board of Law Examiners v. Reinke*, 528.

—*State Board of Law Examiners v. Thoen*, 529.

**CLIENT'S PROPORTION OF DISBURSEMENTS.**

See **COSTS**, 8.

**AUCTIONEER.** See **LICENSE**, 2.

**AUTOMOBILE.** See **NEGLIGENCE**, 6.

**LIABILITY OF OWNER OF CAR.**

See **MASTER AND SERVANT**, 28.

1. The owner of an automobile is liable for injuries resulting from the negligence of the person operating it, only when such negligence occurs while it is being used by his express or implied authority for some purpose for which it is kept by him.

—*Ploetz v. Holt*, 169.

2. Such cars are usually procured and kept for the use of the family, and, ordinarily, such use is not limited to any special purpose. It does not appear in this case that the father had ever placed any restrictions upon the use of the car. If, at the time, it was being used in part for the purposes for which it was kept by the father, the fact that the son may also have been using it in part for purposes personal to himself, would not necessarily absolve the father from liability. We think the circumstances shown by the evidence are such that the jury might infer therefrom that, among the purposes for which the son took the machine, was that of bringing home his mother and sisters, and that he had implied authority to do so.

—*Ploetz v. Holt*, 174.

**QUESTION FOR JURY.**

3. Evidence examined, and held sufficient to require the court to submit to the jury the question as to whether the accident resulted from the negligence of defendant Neil Holt, and also the question as to whether

**AUTOMOBILE—Continued.**

the machine was being used for a purpose for which it was kept by defendant L. J. Holt and by his implied permission.

—Ploetz v. Holt, 169.

4. The tendency of the courts in this class of cases is to resolve doubts against the master to the extent of submitting the question as one of fact to the jury.

—Ploetz v. Holt, 173.

**BAILMENT. See SET-OFF AND COUNTERCLAIM.**

1. The evidence is examined, and it is *held* sufficient to justify a finding of the jury that an agreement between the defendant and the predecessor in title of the plaintiff was an agreement of bailment, and not an agreement for the rental of storage space.

—Huntoon v. Brendemuehl, 54.

**LIABILITY OF CHATTEL MORTGAGEE.**

2. After the bailment of property, the bailor gave a note to the bailee in renewal of an old note, and secured it by a mortgage on the property bailed. The mortgage contained the usual printed clause to the effect that so long as the mortgagor performed the conditions of the mortgage he should remain in possession, and that in consideration thereof he agreed to keep the property in as good condition as it then was at his own cost and expense. It is *held* that such a provision in no way affects the liability of the mortgagee as bailee.

—Huntoon v. Brendemuehl, 54.

**BANK AND BANKING. See EVIDENCE, 7.****VALUE OF BANK STOCK.**

1. Bank stock in one of the chief banks of our large cities may have an easily ascertained market value. But it is different with the stock in a country bank. The deals therein are infrequent. The tangible property of a bank, even if examined, especially by one not an expert, is difficult to estimate; its real value may be known only to the managing officers of the bank, or to those possessing knowledge of banking after a long examination of its books and paper.

—Ludowese v. Amidon, 293.

2. That the books and statements of a bank do not alone determine the value of its stock may be conceded, for the location of the bank, the reputation of the men in charge, and other matters have a bearing.

—Ludowese v. Amidon, 292.

**BANKRUPTCY.** See **LANDLORD AND TENANT**, 2, 5, 6; **SET-OFF AND COUNTERCLAIM**.

**PREFERENCE—COMPUTATION OF TIME.**

1. An inchoate lien by garnishment cannot be tacked to the lien of an execution on the judgment against the defendant, and levied upon the indebtedness owing by the garnishee, so as to make up the period of four months specified by sections 60a, 60b, 67c, and 67f of the bankrupt act. [30 St. 562, c. 541.]

—Marsh v. Wilson Brothers, 254.

2. The defendant brought suit against one Grossman on April 27, 1912, and garnished one Galbraith. Nothing further was done with the garnishment. On June 15, 1912, it took judgment against Grossman, and levied upon the debt due him by the garnishee. Grossman filed his petition in bankruptcy on September 14, 1912. It is *held*, that the four months specified by the bankrupt act commenced to run in June, not in April, and that the trustee in bankruptcy could recover as a preference the money collected by the defendant on its execution.

—Marsh v. Wilson Brothers, 255.

**BENEFICIARY.** See **INSURANCE**, 13–15.

**BILL OF EXCEPTIONS.** See **APPEAL AND ERROR**, 3.

**BILLS AND NOTES.** See **BAILMENT**, 2; **BROKER**, 6; **GUARANTY**, 1; **NEW TRIAL**, 2; **SALE**, 3, 6, 7; **SET-OFF AND COUNTERCLAIM**.

An extension of a promissory note which will release a nonconsenting surety must, like any other contract, be based upon a consideration. A promise by a debtor to pay a past-due debt is not a legal consideration.

—Thyssel v. Holm, 541.

**BOARD OF TRADE.** See **PROPERTY; TAXATION**, 2.

**BOND.** See **DRAIN**, 1.

**BOOKS OF ACCOUNT.** See **EVIDENCE**, 8.

**BOUNDARY.**

1. Ejectment for a strip of land between adjacent landowners. Plaintiff claimed the strip as part of his 80-acre tract according to government survey, also by adverse possession and by practical location of the



**BOUNDARY—Continued.**

boundary line or acquiescence. *Held*: Monuments placed by a county surveyor pursuant to section 773, G. S. 1913, show *prima facie* the section corners and quarter posts of the government survey. Plaintiff failed to adduce testimony sufficient to go to the jury of any other dividing line according to the original government survey between his and defendants' land than the one indicated by said monuments, and it was error to submit the question of government boundary line to the jury.

—Roy v. Dannehr, 233.

2. A pasture fence of a couple of rails or wires which deviates several feet from the general course, whenever a fence post can be saved by nailing to a tree, built by one wholly on his own land through the timber, indicating by its irregular course the builder did not intend it as a true boundary line, ought not to be relied on by an adjacent owner who has had absolutely nothing to do with its location, construction or use, as a division line by implied agreement or acquiescence.

—Roy v. Dannehr, 237.

3. Our decisions are to the effect that one is not to be deprived of his land because, through mistake or ignorance, he placed a fence on what he thought was the division line, when it was not such in fact, unless the evidence of practical location of the line or acquiescence for at least 15 years is clear, positive, and unequivocal.

—Roy v. Dannehr, 237, 238.

**CONSTRUCTION OF DEED—INCORRECT DESCRIPTION.**

4. A deed purported to convey the portion of the grantor's land lying west of a designated county road. Its courses and distances and statement of amount conveyed would carry the grant to the east of the road. The cardinal rule of construction of contracts is to give effect to the intention of the parties. In construing a deed with inconsistent descriptions, preference is given to the part most likely to express the intention of the parties, and as to which there is least likelihood of mistake. The reference to the county road as a boundary is held to prevail over courses and distances and figures as to the quantity of land conveyed.

—Sandretto v. Wahlsten, 331.

**BREACH OF PROMISE. See TORT.****BRIDGE. See MUNICIPAL CORPORATION, 6, 7.**

**BROKER.** See **VENDOR AND PURCHASER, 5-7.**

**DUTY TO HIS PRINCIPAL.**

1. Any attempt by an agent to profit by devious, hidden schemes, or to secretly serve the other party to the bargain, or a failure to disclose that which is for the interest of the principal to know, forfeits the right to compensation and calls for the restoration of anything of value thus wrongfully secured. The law exacts the strictest good faith from the agent. His pecuniary interests must not interfere with his duty toward his principal.

—Stumpf v. Norton, 98.

2. An agent is worthy of his hire. And the one to pay it is usually the one who has the right to demand the loyal service. It is an anomaly to consider a person the agent of one party to a transaction when such party insists that he shall obtain his reward from the other side. What kind of service ought a man to get who employs an agent to serve his interests in a deal, but insists that the agent look to the other side for his pay?

—Stumpf v. Norton, 98.

**ACTION TO RECOVER COMMISSION.**

3. Where a complaint, in an action for compensation for services rendered, alleges the reasonable value thereof, and also that defendant agreed to pay a certain sum therefor, and there is no election at the trial upon which theory, *quantum meruit* or express contract, plaintiff will proceed with the trial, and both issues are retained in the case, plaintiff is at liberty to prove either the agreed or reasonable value, and recover a verdict accordingly.

—Kinzel v. Boston & Duluth Farm Land Co. 416.

**EVIDENCE.**

4. In an action by an agent to recover the reasonable value of services rendered in effecting an exchange of property, evidence of the value of the property received by the principal is proper.

—Stevens v. Wisconsin Farm Land Co. 421.

**SAME—EVIDENCE OF CUSTOMARY CHARGE.**

5. Evidence of customary charges of brokers in similar cases is proper, but, in order that a customary charge may be decisive of the amount of recovery, a custom must be established so definite, uniform, and well understood that it may be assumed the parties contracted with reference to it, and in effect made it a part of their contract.

—Stevens v. Wisconsin Farm Land Co. 421.

**BROKER—Continued.**

6. Action upon promissory notes. Defendant interposed a counterclaim for services in selling land belonging to plaintiff. The evidence was conflicting whether the services were rendered to plaintiff or to a corporation of which he and his son were in sole control. *Held*: The findings were sustained by the evidence.

—Kennison v. Haw, 140.

**BURDEN OF PROOF.** See **ASSIGNMENT**, 4; **EXCHANGE OF PROPERTY**, 4; **INSURANCE**, 9; **MASTER AND SERVANT**, 5; **MECHANIC'S LIEN**, 2; **RAILWAY**, 11.

**CANCELATION OF INSTRUMENT.** See **EXCHANGE OF PROPERTY**, 1, 3; **FRAUDULENT CONVEYANCE**.

An action to rescind will lie where defendant by misrepresentations of material facts, relied on by plaintiff, induced plaintiff to convey his land in exchange for defendant's bank stock, without proof that plaintiff was damaged.

—Ludowese v. Amidon, 288.

**CARRIER.****TRANSPORTATION OF GOODS.**

1. In this action to recover damages alleged to have been caused to a carload of opera chairs while being transported from Minneapolis to Herman, Minnesota, the evidence showed that on the arrival of the car at Herman the consignee refused to receive the shipment, and it was returned to Minneapolis in the same car without being unloaded. It is *held*: It was prejudicial error to exclude evidence of competent witnesses to prove that the chairs were in the same condition when the car arrived in Minneapolis on its return from Herman as they were when loaded for shipment.

—Harris v. Great Northern Railway Co. 357.

**TRANSPORTATION OF LIVE STOCK.**

2. In an action to recover damages done to cattle shipped over the defendant railroad, it is *held* that the verdict is not so against the evidence that it should be disturbed by this court.

—Raetti v. Great Northern Railway Co. 360.

**TRANSPORTATION OF PASSENGERS.**

3. It is the carrier's duty to provide its passengers with a seat and with a safe place to ride, and when it overcrowds a train beyond its seating

**CARRIER—Continued.**

capacity, it is bound to exercise care proportionate to the increased danger caused by such overcrowding.

—Shields v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 329.

4. The carrier knows far better than the passenger the dangers arising from an exposed situation and from irregular modes of travel, and the passenger is entitled to place great reliance on the invitation or assent of the carrier's servants, who are so highly charged with his protection and care.

—Shields v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 330.

5. Plaintiff was injured while riding in the baggage compartment of one of defendant's cars. He was sitting in the doorway, with his feet hanging outside. His feet came into contact with a platform of defendant. The train was overcrowded. There is evidence that defendant's trainmen directed passengers to ride in the baggage car, assented to their sitting in the doorway with their feet outside, took up tickets from them while so seated, and on one occasion cleared a place for them to sit in this manner. *Held* a question for the jury whether there was imposed on defendant a duty to warn passengers of the proximity of this platform to the track, and whether failure to give such warning was negligence.

—Shields v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 327.

6. The question of plaintiff's contributory negligence was also for the jury. His conduct would under ordinary circumstances be negligent; but where an act ordinarily negligent is done by a passenger upon the express or implied invitation of the employees in charge of the train, the passenger will not as a rule be charged with contributory negligence as a matter of law. The act of the passenger may be so obviously dangerous that even such invitation will not relieve him of contributory negligence. The act of plaintiff in this case was not so inherently dangerous that it can under all the circumstances be said to be negligent as a matter of law.

—Shields v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. 327.

**LIABILITY OF CARRIER TO PASSENGER'S COMPANION.**

7. One entering a railway train for the purpose of assisting an outgoing passenger, but himself not intending to take passage, is neither a passenger nor trespasser; and the extent of the company's duty, when without notice of his presence, is, in the absence of statute, to exercise

**CARRIER—Continued.**

ordinary care not to injure him while there, or when attempting to alight, which does not include any duty to hold the train to enable him to alight safely.

—Street v. Chicago, Milwaukee & St. Paul Railway Co. 517.

8. Such a person, however, is within the protection of G. S. 1913, § 4399, requiring passenger trains to stop "a sufficient time, not less than one minute, to safely discharge and receive passengers."

—Street v. Chicago, Milwaukee & St. Paul Railway Co. 518.

9. Nor is he within the inhibition of G. S. 1913, § 9010, making it unlawful "for any person other than a passenger or employee to get on or off, or attempt to get on or off \* \* \* any engine or car" while in motion. That section does not include persons lawfully on trains.

—Street v. Chicago, Milwaukee & St. Paul Railway Co. 518.

**STEPPING FROM MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.**

10. Whether defendant violated the duty prescribed by G. S. 1913, § 4399, and whether plaintiff was guilty of contributory negligence in attempting to alight from the train while it was in motion, *held*, under the evidence, questions for the jury.

—Street v. Chicago, Milwaukee & St. Paul Railway Co. 518.

"CASE." See **APPEAL AND ERROR**, 3, 4, 6; **COSTS**, 7.

**CASES (MINNESOTA) DISTINGUISHED.**

*Altmann v. Gabriel*, 28 Minn. 132, 9 N. W. 633.

—*Dr. Shoop Family Medicine Co. v. Oppliger*, 536.

*City of Albert Lea v. Nielsen*, 83 Minn. 246, 86 N. W. 83.

—*Davis v. Forrestal*, 17, 18.

*City of Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361.

—*Village of Minneota v. Martin*, 501, 502.

*Cobb v. French*, 111 Minn. 429, 127 N. W. 415.

—*Milton Dairy Co. v. Great Northern Railway Co.* 242.

*Fegelson v. Niagara Fire Ins. Co.* 94 Minn. 486, 103 N. W. 495.

—*Davis v. Forrestal*, 18.

*Fidelity & Casualty Co. of New York v. Crays*, 76 Minn. 450, 79 N. W. 531.

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- Dr. Shoop Family Medicine Co. v. Oppliger, 536.
- Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513.
- Monthly Instalment Loan Co. v. Skellet Co. 146.
- Randall Printing Co. v. Sanitas Mineral Water Co. 120 Minn. 268, 273, 139 N. W. 606, 608.
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- State v. District Court for Hennepin County, 42 Minn. 247, 44 N. W. 7.
- Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy, 107, 111.

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- In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.
- McAllister v. Rowland, 31, 32.

**CENSUS. See STATUTE, 3.**

**CERTIFICATE.** See **DRAIN**, 6; **INSURANCE**, 5, 12-15.

**CERTIFIED CASE.**

Where a case is certified to this court under G. S. 1913, § 9251, the proceeding is purely statutory, and the court has no jurisdiction unless it is within the statute. There is no warrant for certifying questions that have arisen upon a trial in which the jury disagreed.

—**State v. Toole**, 532.

**CHARGE TO JURY.** See **MONOPOLY**, 4; **TRIAL**, 2-9.

**CHATTEL MORTGAGE.** See **BAILMENT**, 2.

**CONTRACT SUBJECT TO EXISTING STATUTES GIVING PRIOR LIENS.**

1. A chattel mortgagee contracts with reference to existing statutes giving prior liens, whether a thresher's lien (G. S. 1913, § 7082), a lien for transportation and storage (G. S. 1913, §§ 7036, 7037), or similar liens.  
—**Monthly Instalment Loan Co. v. Skellet Co.** 146.

**LIEN OF WAREHOUSEMAN SUPERIOR TO CHATTEL MORTGAGE.**

2. By Laws 1905, c. 328, as amended by Laws 1907, c. 114 (G. S. 1913, §§ 7036, 7037), giving a lien on personal property transported and stored at the request of the owner or legal possessor thereof, it was intended that one transporting and storing property at the request of a chattel mortgagor in legal possession should have a lien superior to the interest of the chattel mortgagee.  
—**Monthly Instalment Loan Co. v. Skellet Co.** 144.
3. The statute, so construed, is constitutional.  
—**Monthly Instalment Loan Co. v. Skellet Co.** 144.

**CITY OF MINNEAPOLIS.** See **MUNICIPAL CORPORATION**, 4-10; **PENSION**.

**CITY OF ST. PAUL.** See **MUNICIPAL CORPORATION**, 19; **TAXATION**, 9-12, 15.

**CLASSIFICATION.** See **STATUTE**, 1-3, 8.

**CLERK OF DISTRICT COURT.** See **STATUTE**, 7.

**CONDITION.** See **SALE**, 4, 6, 13; **INSURANCE**, 6.

**BREACH OF CONDITION.**

See **LANDLORD AND TENANT**, 7, 8.

CONSIDERATION. See ASSIGNMENT, 4; BILLS AND NOTES; MORTGAGE, 1, 2, 4.

CONSTITUTION. See CHATTEL MORTGAGE, 1-3; INJUNCTION, 8; INTOXICATING LIQUOR, 2; PUBLIC LAND.

EVERY PRESUMPTION IN FAVOR OF VALIDITY OF ACT.

1. The setting aside of an act of the legislature is not a light matter. All argument based on the unwisdom of the legislation is apart from the issue. The court cannot set aside laws because it may think them unwise. Their wisdom is for the legislature to determine. Nor can the court set aside an act because it was induced by improper motives. This court cannot sit in review in such matters. The question presented to it for review is not one of legislative wisdom, but solely one of legislative power. Every possible presumption is in favor of the validity of the statute.

—State ex rel. v. County Board of St. Louis County, 129.

PUBLIC POLICY.

2. A constitutional law passed by the legislature is not against public policy. It is public policy.

—Midway Realty Co. v. City of St. Paul, 301.

SPECIAL LEGISLATION.

See STATUTE, 8.

CLASSIFICATION OF CITIES.

See STATUTE, 1, 2.

TITLE AND SUBJECT OF ACT.

See STATUTE, 4-9.

DUE PROCESS OF LAW—VESTED RIGHT TO PENSION.

3. Where a member of the Minneapolis Fire Department Relief Association, an organization formed under the general laws of the state for the relief of disabled members of the Minneapolis Fire Department, is determined by the association to be disabled within the meaning of its constitution and by-laws and is granted a pension as therein provided, his right to the pension is a vested legal right of which he cannot be deprived except by due process of law, namely, by notice and opportunity to be heard in any proceedings had by the association for the purpose of terminating his rights.

—Stevens v. Minneapolis Fire Department Relief Assn. 381.

TAXATION.

4. The taxation of a membership in the Duluth Board of Trade does not violate any provision of the Federal or state Constitution.

—State v. McPhail, 399.

## CONSTITUTION—Continued.

5. Laws 1901, p. 215, c. 167, providing that a village council may on its own motion order a sidewalk constructed, is not unconstitutional because it does not give property owners an opportunity to be heard as to the propriety or necessity of the proposed improvement. The opportunities which the property owner has to be heard when the assessment is fixed, and on the application for judgment, satisfy the due process of law requirement.

—State v. Burnes, 471.

## REMOVAL OF MUNICIPAL OFFICER.

See MUNICIPAL CORPORATION, 5; OFFICER, 2.

**CONTRACT.** See ADOPTION, 1-4; ASSIGNMENT, 2, 3; BROKER, 3; EVIDENCE, 12-15; LANDLORD AND TENANT, 3, 4; PRINCIPAL AND AGENT, 1, 2; REFORMATION OF INSTRUMENT; SPECIFIC PERFORMANCE, 2.

## CONSIDERATION.

See BILLS AND NOTES.

## CONSTRUCTION.

See BOUNDARY, 4; INSURANCE, 2; WORDS AND PHRASES, 1, 2.

## WHEN MADE WITH REFERENCE TO CUSTOM.

See BROKER, 5.

## RESTRAINT OF TRADE.

1. A covenant in a bill of sale of a bus and baggage transfer business, not to engage in the same business in a certain city, *held* not unlawful as an unreasonable restraint of trade.

—Holliston v. Ernston, 49.

## COVENANT NOT TO ENGAGE IN BUSINESS.

2. A covenant "not to start a bus line in Granite Falls, or drive a bus in Granite Falls," *held*, in view of the whole transaction in connection with which it was made, to amount to an agreement by the covenantors not to engage in the business so as to bring their names and influence to the aid of any competitor.

—Holliston v. Ernston, 49.

3. The gist of the covenant in suit was that the defendants would not engage in business so as to bring their names and influence to the aid of any competitor carrying on the same line of business within the prohibited

**CONTRACT—Continued.**

territory. This was a valuable right, and must be presumed to have entered into the consideration of the bill of sale. Plaintiff thereby purchased their right to compete in their own persons in the business specified; and, defendants having violated the agreement, the relief afforded should be commensurate.

—*Holliston v. Earnston*, 53.

**RESCISSION.**

See **SALE**, 1, 2.

**PERFORMANCE.**

See **INJUNCTION**, 2; **SPECIFIC PERFORMANCE**, 1.

**EVIDENCE.**

See **ADOPTION**, 1, 5.

**CONTRIBUTORY NEGLIGENCE.** See **APPEAL AND ERROR**, 8, 14; **CARRIER**, 4, 6; **MASTER AND SERVANT**, 12, 20, 26; **NEGLIGENCE**, 5; **RAILWAY**, 8, 10, 11.

**CORPORATION.** See **BROKER**, 6; **MONOPOLY**, 1, 5, 6.

**ISSUE OF STOCK—ACTION TO TEST VALIDITY.**

1. Unissued corporate stock belongs to the corporation considered as a legal person or entity. When directors deal wrongfully with unissued corporate stock, the corporation itself is primarily interested and the proper party plaintiff.

—*Hoffman Motor Truck Co. v. Erickson*, 281.

2. Corporation *held* to have right to test by action the validity of a certain stock issue.

—*Hoffman Motor Truck Co. v. Erickson*, 279.

3. Where defendants, the sole owners and officers of a newly formed corporation, issued part of its stock to themselves as fully paid in exchange for property excessively valued, and thereafter like stock was sold by the corporation to other persons at par and for face value received, the corporation *held*, on the facts of the case, entitled neither to recover damages from defendants nor to have their shares canceled in excess of the value of the property given therefor.

—*Hoffman Motor Truck Co. v. Erickson*, 280.

**ACTION AGAINST CORPORATION—PLEADING CORPORATE EXISTENCE.**

4. In an action against a corporation, the complaint need not allege defendant's corporate existence, and a denial thereof in the answer is unavailable.

## CORPORATION—Continued.

ing, where it is refuted by the terms of the verification and by evidence brought out by defendant itself.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

## NOTICE OF IMPROVEMENTS TO ITS REAL ESTATE.

5. A corporation can gain knowledge only through its officers or agents. It is not necessary that its directors or stockholders have knowledge of improvements to its realty in order to hold the corporation liable for a mechanic's lien for such improvements.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 320.

6. Defendant corporation *held* charged with its secretary's knowledge that the improvements to its realty, covered by the mechanic's lien in suit, were being made at the instance of the lessee of the property, so as to subject the same to lien under the statute.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

## COSTS. See APPEAL AND ERROR, 1.

## STATUTORY COSTS.

1. Because of delay in printing the record no statutory costs were allowed.
- French v. Yale, 65.

## TAXATION OF COSTS AGAINST THE STATE.

2. Governmental authority is involved in penal actions, in those to enforce payment of taxes or to determine the legality of the organization of a municipal subdivision of the state, but is not involved in an ordinary action for the recovery of money and property. Hence, in this case, the taxation of costs in favor of defendant is affirmed. *State v. Buckman*, 95 Minn. 272, 278, 104 N. W. 289, followed.

—*State v. Fullerton*, 151.

## TAXABLE DISBURSEMENTS.

3. It is the province of the trial court to determine whether disbursements were "necessarily paid or incurred." G. S. 1913, § 7976. To a large extent this involves an exercise of discretion and judgment.

—*Salo v. Duluth & Iron Range Railroad Co.* 364.

## SERVING SUBPŒNAS.

4. Expenses for serving subpœnas by a private person are not taxable disbursements.

—*Salo v. Duluth & Iron Range Railroad Co.* 361.

## COSTS—Continued.

## TRANSCRIPT OF TESTIMONY.

5. Amounts paid for transcript of testimony obtained for the use of the attorney during the progress of the trial are not taxable disbursements.  
—*Salo v. Duluth & Iron Range Railroad Co.* 361.

## MAPS AND PHOTOGRAPHS.

6. The expense for maps and photographs received in evidence is not necessarily an item of taxable disbursements. The trial court's determination that the map and photographs were not necessary disbursements is not shown to have been erroneous or an abuse of judgment or discretion in this case.  
—*Salo v. Duluth & Iron Range Railroad Co.* 361.

## TRANSCRIPT OF EXHIBITS.

7. Where a motion for a new trial is made upon a settled case which includes a transcript of exhibits, the expense of copying them is a disbursement in the trial court and not taxable in this court. If other transcripts are made thereafter, the expense thereof cannot be taxed.  
—*Itasca Cedar & Tie Co. v. McKinley*, 191.

## CLIENT'S PROPORTION OF DISBURSEMENTS.

8. Where an attorney has secured a number of clients and brings separate actions against a defendant whose one act of negligence has injured each client, and the attorney procures documentary evidence which is to be used successively in the trial of each case, and the defendant makes a settlement, which includes disbursements, with all litigants save one, that one is not entitled to tax as costs for such documentary evidence more than his proportionate share of its cost unless he shows that he has actually paid or incurred more than such share. Plaintiff failed to make such showing.  
—*Salo v. Duluth & Iron Range Railroad Co.* 361.

COUNTERCLAIM. See *BROKER*, 6.

COUNTY AND COUNTY OFFICER.

## BOARD OF COUNTY COMMISSIONERS.

See *DRAIN*, 3; *INCOMPETENT*, 2.

## CLERK OF DISTRICT COURT.

See *STATUTE*, 7.



COURT COMMISSIONER. See **HABEAS CORPUS**, 1, 2.

COURT (DISTRICT).

CLERK OF COURT.

See **STATUTE**, 7.

COURT (PROBATE). See **DESCENT AND DISTRIBUTION; INCOMPETENT**, 2.

**COURT OF SUPERIOR AND GENERAL JURISDICTION.**

1. Within the limitations incident to the subject matters specified by the Constitution, our probate courts possess superior and general jurisdiction, and have implied power to do whatever is reasonably necessary to carry out powers expressly conferred.  
—Fiske v. Lawton, 91.
2. The probate court is a court of superior jurisdiction and enjoys the same presumptions of jurisdiction as superior courts of common-law jurisdiction.  
—Wilkowske v. Lynch, 494.
3. There is a marked distinction between the jurisdiction and powers of our probate courts under the constitutional provision giving them jurisdiction over estates of deceased persons (Const. art. 6, § 7) and probate, surrogates' or ordinaries' courts of other states, which derive all their jurisdiction and powers from statute. See *Culver v. Hardenbergh*, 37 Minn. 225, 234, 33 N. W. 792, 797.  
—Fiske v. Lawton, 91.

**PRESUMPTION OF JURISDICTION.**

4. Its jurisdiction over the subject-matter, including its authority to hear and determine the particular proceeding, is presumed in the absence of facts affirmatively appearing on the face of the record that show want of jurisdiction.  
—Wilkowske v. Lynch, 494.

**PETITION FOR APPOINTMENT OF GUARDIAN—OBJECTION TO DEFECTIVE PETITION.**

5. Any insufficiency in a petition under G. S. 1913, § 7433, for the appointment of a guardian for an incompetent person, when made by a person not authorized to make it or in the facts set forth therein constituting the grounds for such appointment, should be taken advantage of by appropriate pleadings, motions, or objections at the trial. Where this is not done such defects are waived.  
—Wilkowske v. Lynch, 494.

COURT (SUPREME). See **CERTIFIED CASE**.

COVENANT. See CONTRACT, 1-3; INJUNCTION, 6; LANDLORD AND TENANT, 3, 4.

CRIMINAL LAW. See INDICTMENT AND INFORMATION; INJUNCTION, 7, 8.

ACCOMPLICE.

1. A woman whose general reputation was that of a public prostitute was not an accomplice of the person who sold her intoxicating liquor.  
—State v. Brand, 408.

JUDICIAL NOTICE OF VILLAGE ORDINANCE.

2. In a criminal prosecution for violation of a village ordinance, the complaint is sufficient if it refers to the ordinance by number, chapter, or section, and it is not necessary to introduce the ordinance in evidence.  
—Village of Minneota v. Martin, 498.

EVIDENCE—INTENT.

See INTOXICATING LIQUOR, 2; WEIGHT AND MEASURE, 1.

MOTIVE.

3. The knowledge possessed by defendant as to the wishes and intentions of his relatives concerning matters of interest to himself may be shown as bearing upon his motives.  
—State v. O'Hagan, 58.

NEGLECT TO OFFER LETTER.

4. Defendant was asked if a certain statement had been made to him in a certain letter, and answered, "Yes." In the absence of any request to produce the letter, and of any objection based upon its nonproduction, the omission to offer it in evidence was not error.  
—State v. O'Hagan, 58.

EXAMINATION OF EXPERT.

5. The credibility of an expert witness is ordinarily to be tested by his cross-examination, and, though it may be proper to do so by the testimony of another expert specially qualified in respect to the subject-matter, the extent to which the examination of such other expert may be carried rests, as in the case of cross-examination, in the sound discretion of the court.  
—State v. Minneapolis Milk Co. 35.

TRIAL—MISCONDUCT OF COUNTY ATTORNEY.

6. Whether a county attorney was guilty of misconduct in delivering an interview of an inflammatory nature to the newspapers, at the close of a

## CRIMINAL LAW—Continued.

criminal trial, was peculiarly one for the trial court to determine. The act of the prosecuting attorney, even though his remarks were not intended for publication, and he so informed the reporters, is not to be commended.

—State v. Minneapolis Milk Co. 45.

7. The propounding to him of questions involving improper assumptions and insinuations held to have been without substantial prejudice.

—State v. O'Hagan, 58.

## ARGUMENT OF COUNTY ATTORNEY.

8. The improper remarks of the county attorney were not prejudicial error under the facts of this case.

—State v. Brand, 408.

## RIGHT OF JUDGE TO STATE THE EVIDENCE.

9. It is well settled in this state that the trial judge in criminal cases may review the evidence in his instructions to the jury, and may state to them that it tends to prove certain facts. The only restriction upon the right is that the review shall be fair and impartial, and not in a manner to confuse the jury or to lead them to a particular result.

—State v. Minneapolis Milk Co. 44, 45.

## CHARGE TO JURY.

10. Where the offense is defined by statute, and this definition is given to the jury, if defendant desires a more specific statement as to the elements necessary to constitute such offense, he should make a request therefor.

—State v. O'Hagan, 58.

11. The charge as to the prerequisites necessary to justify a conviction upon circumstantial evidence held sufficiently favorable to defendant.

—State v. O'Hagan, 58.

## SEPARATION OF JUROR.

12. A temporary separation of a juror from the others, after the case has been submitted to them, is no ground for a new trial, where the facts and circumstances exclude all reasonable inference, presumption, or suspicion that the juror has been tampered with, and it clearly and affirmatively appears that no prejudice has resulted.

—State v. Georgian, 515.

## APPEAL AND ERROR—RECORD.

13. The verity of a properly authenticated return cannot be attacked upon appeal.

—State v. O'Hagan, 58.

CROSS-EXAMINATION. See CRIMINAL LAW, 5; WITNESS, 6.

CUSTOM. See BROKER, 5.

A lease of farm land construed and *held* definitely to fix the duration thereof, and that evidence tending to show a custom in respect to the date of the termination of such leases was properly excluded by the trial court.

—Kees v. Christensen, 230.

DAMAGES. See APPEAL AND ERROR, 17, 18; EMINENT DOMAIN, 7; FRAUD, 8, 9; SALE, 3; WATER AND WATERCOURSE.

#### LIQUIDATED DAMAGES.

1. An employee, hired for no definite time, was required to deposit a month's wages with the employer to guarantee that he would keep sober while at work. The jury under proper instructions found that the agreement relating to the deposit was not one for liquidated damages. The evidence supports the finding.

—Quigley v. C. S. Brackett Co. 366.

#### IN CONDEMNATION PROCEEDING.

See EMINENT DOMAIN, 7.

#### IN ACTION FOR FRAUD.

2. Action to recover for fraudulent representations in making sale of a horse. *Held*: Plaintiffs were entitled to interest on the amount paid for the horse as an element of damages, or a legal incident to the demand of damages in the complaint. In such case interest may be awarded, though not asked for in the complaint.

—Jones v. Burgess, 266.

#### IN ACTION FOR PERSONAL INJURY.

3. Damages *held* not so excessive as to indicate passion or prejudice on the part of the jury.  
—Gillespie v. Great Northern Railway Co. 2.
4. Plaintiff was employed as electric signal maintainer upon defendant's railway, and suffered loss of sight in one eye, fracture of the jaw bone, permanent disfigurement of the face and loss of time, but without decrease in earning capacity. Verdict for \$11,375 was reduced to \$9,000 by the court. *Held*: No abuse of discretion on the part of the court.  
—Gillespie v. Great Northern Railway Co. 9.
5. The injury was a compound dislocation of the left ankle joint, with a fracture of the tibia. Three operations under anæsthetic were necessary.

**DAMAGES—Continued.**

The leg is shortened an inch and the foot drawn up at the heel, the bones of the foot and of the tibia are fused, and the ankle probably stiff. At the time of the trial, five and one-half months after the accident, plaintiff had but slight use of the foot, and his injury will permanently impair his capacity. He was 44 years old and earning 45 cents an hour when injured. A verdict of \$4,000 was not excessive.

—Falkenberg v. Bazille & Partridge, 20.

6. Verdict for \$2,500. Plaintiff, who was 72 years old, suffered fractured ribs and a fracture of the thigh. Two years after the accident he was unable to walk without crutches. The fracture resulted in a false joint and a misplaced position of the leg. *Held*: The verdict was not excessive.

—Bolstad v. Armour & Co. 157.

7. Verdict for \$5,000. Plaintiff suffered a compound Pott's fracture of the left leg just above the ankle. The bones united perfectly and the leg is of normal length. *Held*: The verdict was excessive and a new trial was granted unless plaintiff consented to a reduction of the verdict to \$3,000.

—Ploetz v. Holt, 171, 175, 176.

8. Action for negligence in running defendant's locomotive over and cutting a hose across its track, resulting in destruction of plaintiff's wearing apparel and furniture by fire. *Held*: The damages were not excessive.

—Bodkin v. Great Northern Railway Co. 219.

9. Verdict for \$16,500, reduced by the trial court to \$12,000. *Held*: The amount was not excessive, on the record presented, but leave was granted to apply to the trial court on evidence discovered since the trial for reconsideration thereof only.

—Campbell v. Canadian Northern Railway Co. 246, 251.

10. Action for assault and battery. Verdict for \$1,250, reduced to \$850 by the trial court. Plaintiff claimed his sense of hearing was permanently impaired. *Held*: The damages were not so excessive as to require a new trial.

—Evertson v. McKay, 265.

11. Verdict for \$30,000, reduced to \$25,000. Plaintiff, at the age of 27 years, lost his right arm and leg, and received minor hurts. He fully recovered his general health. He earned \$420 per year and received board, lodging, etc. *Held*: The verdict as reduced by the trial court was not excessive.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 373.

12. Verdict for \$5,000 in favor of plaintiff. Plaintiff was 29 years of age and dependent upon manual labor for his support. His leg was shortened 1½ inches and the evidence indicated it would always remain weak,

**DAMAGES—Continued.**

because the bones were turned from their normal position. *Held*: While the verdict was large it was approved by the trial court, and the facts do not justify this court in interfering.

—*Marfia v. Great Northern Railway Co.* 466, 470.

**EVIDENCE.**

See **CANCELATION OF INSTRUMENT.**

**EVIDENCE—ALLEGATION OF PERMANENT INJURY.**

13. A general allegation of permanent injury resulting from an assault and battery alleged to have been committed upon plaintiff by defendant *held* sufficient to admit evidence of the nature and character of the injury so claimed to be permanent.

—*Evertson v. McKay*, 260.

**DANGEROUS MACHINERY.** See **MASTER AND SERVANT**, 19; **NEGLIGENCE**, 1.

Whether Laws 1911, p. 403, c. 288, requiring dangerous machinery to be guarded, is for the benefit of any but employees, is not decided.

—*Mitton v. Cargill Elevator Co.* 69.

**DEATH.** See **INSURANCE**, 13-15.

**DEATH BY WRONGFUL ACT.** See **MASTER AND SERVANT**, 6.

**ACTION UPON FOREIGN STATUTE—LIMITATION OF ACTION.**

1. An action for damages for a death resulting from a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the statutes of such state.

—*Bond v. Pennsylvania Railroad Co.* 196.

**PROCEDURE GOVERNED BY LEX FORI.**

2. The time at which such action is deemed as commenced and all other matters pertaining to procedure are determined and governed exclusively by the law of the forum.

—*Bond v. Pennsylvania Railroad Co.* 196.

**DEBT.** See **TAXATION**, 18.

**DECEIT.** See **FRAUD**, 1, 3.

**DECLARATION.** See **EVIDENCE**, 6.

**DEED.** See **BOUNDARY**, 4; **EXCHANGE OF PROPERTY**, 1; **MORTGAGE**, 1; **WILL**, 1.

**DELIVERY TO THIRD PERSON FOR GRANTEE.**

1. A deed delivered to a third person to be delivered to the grantee at the grantor's death cannot be recalled.  
—Dickson v. Miller, 349.
2. A warranty deed provided the grantor was to remain in full possession and ownership of the premises conveyed during his lifetime and that it was not to be placed on record until after his death. The deed was signed by the grantor but not by his wife. It conveyed land to the minor sons of the wife by a former marriage. The grantor delivered it to her during her last illness, she read it and handed it to the boy's grandmother, with the request that she take care of it until the death of the grantor. *Held*: A good delivery, and the evidence sustained the special verdict.  
—Ekblaw v. Nelson, 335, 337.
3. The deed passed the title to the grantees, subject to an estate for life in the grantor.  
—Ekblaw v. Nelson, 335.
4. The evidence sustains a finding that the grantor in a deed delivered it to a third person with the instructions to deliver it to the grantee upon the grantor's death, parting with all control of it, not reserving a right to recall it, and intending thereby to make a final disposition of the property deeded.  
—Dickson v. Miller, 346.
5. The grantee in a deed thus delivered, upon the death of the grantor and the delivery of the deed to him by the depository, has absolute title.  
—Dickson v. Miller, 346.

**CONSTRUCTION.**

6. If doubt exists as to the meaning of the language of a deed, reference may be had to the circumstances attending its execution, the parties' practical construction of it, and the previous negotiations of the parties. The evidence as to such matters makes clear the actual intent of these parties to bound their grant by the county road.  
—Sandretto v. Wahlsten, 332.

**DEFAULT.** See **JUDGMENT**, 2-4.

**DELIVERY.** See **DEED**, 1, 2, 4, 5; **MECHANIC'S LIEN**, 4.

**DEMAND.** See **REFLEVIN**, 1.

**DESCENT AND DISTRIBUTION.** See **ADOPTION**, 7.

Intestate's estate having been reduced to personalty, the probate court had power to adjudge to whom the same should be apportioned, and, as an incident thereto, to determine the rights of appellant, the daughter of the "adopted" child, under the contract, and, further, by its final decree to award to appellant the share of the estate to which she was equitably entitled under the contract whereby her mother was "adopted."

—Fiske v. Lawton, 86.

**DESCRIPTION.** See **BOUNDARY**, 4; **DRAIN**, 1.

**DISBURSEMENT.** See **COSTS**, 3-7.

**DISCRETION OF COURT.** See **APPEAL AND ERROR**, 6; **COSTS**, 3, 6; **DAMAGES**, 4; **EQUITY**, 2; **EVIDENCE**, 3, 11; **INCOMPETENT**, 3; **INJUNCTION**, 5; **JUDGMENT**, 4; **JURY**, 2; **NEW TRIAL**, 3; **WITNESS**, 6.

**DISMISSAL OF ACTION.** See **JUDGMENT**, 8; **PRINCIPAL AND AGENT**, 2.

**DITCH.** See **DRAIN**.

**DRAIN.**

#### COUNTY DITCH.

See **INJUNCTION**, 2.

#### BOND TO PAY PRELIMINARY EXPENSE.

1. Petitioners, who execute a bond in a ditch proceeding under Laws 1905, c. 230, conditioned to pay the preliminary expense if the ditch is not established, are liable thereon to a county which in good faith proceeds with the petition, though the description of the route and termini of the ditch in the petition is so defective as to render the proceeding invalid on jurisdictional grounds.

—County of Morrison v. Lejouburg, 495.

2. The evidence justifies the finding of the court as to the amount of the preliminary expense.

—County of Morrison v. Lejouburg, 496.

#### COUNTY BOARD MAY ACT AT SPECIAL MEETING.

3. Under Laws 1905, c. 230, § 9, the county board may either establish or refuse to establish a ditch at a special meeting called for a rehearing of a petition and report, when the final order establishing or refusing to
- 124 M.—37.



**DRAIN—Continued.**

establish a ditch has been held void for failure to give proper notice of hearing.

—County of Morrison v. Lejouburg, 495.

**TOWN DITCH—TOWN NOT LIABLE FOR COST.**

4. Chapter 127, Laws of 1909, providing for the construction of town ditches, requires the petitioners for the ditch to bear the entire expense of establishing and constructing it, and does not impose any liability upon the town. If the statutory prerequisites have been complied with, the contract price for constructing such ditch may be recovered from the petitioners, but cannot be recovered from the town.

—State Bank of Fairfax v. Vlaar, 78.

5. The town officers, in performing the duties imposed upon them by this law, act as agents of the law, and not as representatives of the town.

—State Bank of Fairfax v. Vlaar, 78.

**SAME—ACTION FOR CONTRACT PRICE—COMPLAINT.**

6. By the terms of the statute the contract price is not payable until the ditch has been inspected and the inspectors have filed a certificate that it has been completed in accordance with the order establishing it. A complaint which does not show that such certificate was made, nor that the facts were such that the inspectors ought to have made it and refused to do so, fails to state a cause of action.

—State Bank of Fairfax v. Vlaar, 78.

**DULUTH BOARD OF TRADE.** See **PROPERTY; TAXATION**, 2.

**DYNAMITE.** See **MASTER AND SERVANT**, 7.

**EDUCATION.**

**AGRICULTURE.**

See **EMINENT DOMAIN**, 5.

**EJECTMENT.** See **BOUNDARY**, 1; **EMINENT DOMAIN**, 7; **TRIAL**, 13.

Action in ejectment. The answer admitted plaintiff was the owner of the land, but that defendants were rightfully in possession under a lease from plaintiff's grantor. The supplemental answer alleged that, after the original answer was served, plaintiff took and was in the actual possession of the premises, and neither defendant was in possession of any part of the land, and prayed for a dismissal of the action. *Held*:

**EJECTION—Continued.**

The supplemental answer entitled plaintiff to judgment on the pleadings.  
The questions raised were moot questions.  
—Edwards v. Smith, 538.

**ELECTRICITY.** See RAILWAY, 3.

**EMINENT DOMAIN.** See APPEAL AND ERROR, 18.

**POWER OF MUNICIPALITIES.**

1. It is settled law that the municipalities of a state, including cities, villages, towns, counties and school districts, have no inherent power of eminent domain and can exercise it only upon express or implied legislative grant.  
—Independent School District of Virginia v. State, 274.

**CONDEMNATION OF STATE LAND.**

2. State lands are not subject to appropriation in condemnation proceedings except when the right to so acquire them is expressly or by necessary implication granted by the legislature.  
—Independent School District of Virginia v. State, 271.
3. The general power to take lands of the state by right of eminent domain is not granted by R. L. 1905, § 2520, but the exercise thereof when granted by other statutes is controlled by the procedure set forth in sections 2520, et seq. The old statute (G. S. 1894, § 2606) embodied both a grant of power and the mode of its exercise. These were separated by the revision of 1905. The power in the case of school districts is found in other statutes and, as there granted, no limitations on the character of the property that may be thus taken are made.  
—Independent School District of Virginia v. State, 276.

**SAME—BY SCHOOL DISTRICT.**

4. Chapter 53, Laws 1872 (section 2606, G. S. 1894) construed, and held to grant, by necessary implication, the right to acquire such lands for other public purposes, and the right so granted was carried forward in the statutory revision of 1905, and thereby in effect extended to all corporations entitled to exercise the right of eminent domain, including school districts.  
—Independent School District of Virginia v. State, 272.
5. Under chapter 258, Laws 1913 [G. S. 1913, §§ 2748, 2749] a duly organized school district of the state may thus acquire an interest in and to a tract of state school land for the educational purposes, namely, experimentation and instruction in agriculture, provided for by that statute.  
—Independent School District of Virginia v. State, 272.

**EMINENT DOMAIN—Continued.**

6. Rights acquired in such condemnation proceedings are equivalent to and answer every purpose of a public sale, and the statutes, which, by implication, grant the right, are not in violation of article 8, § 2, of the Constitution.

—Independent School District of Virginia v. State, 272.

**AWARD OF DAMAGES EXCESSIVE.**

7. In an action in ejectment, by the answer of defendant turned into a condemnation proceeding under sections 5423, 5424, G. S. 1913, it is *held* that the award of damages is excessive, and that a new trial should be granted, unless plaintiff consents to a reduction of the verdict.

—Potts v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 413.

**ENTRY.** See **LANDLORD AND TENANT**, 2, 7, 9.

**EQUITY.** See **ADOPTION**, 2; **INJUNCTION**, 1, 4, 7.

1. Where a plaintiff has an equitable cause of action, and equity jurisdiction attaches as a matter of right, the claims of all proper parties to the suit will be adjusted in one suit, notwithstanding that such claims constitute actions at law triable to a jury.

—Davis v. Forrestal, 10.

2. If, when equity jurisdiction is invoked solely on the ground that thereby a multiplicity of suits will be avoided, the court may to a certain extent exercise discretion in entertaining the suit, it is certainly well settled that on an application for a temporary injunction pending suit the order will not be reversed unless an abuse of discretion is apparent.

—Davis v. Forrestal, 18.

**ESTATE FOR LIFE.** See **DEED**, 2, 3; **HOMESTEAD**.

**ESTOPPEL.** See **FRAUD**, 2; **FRAUDULENT CONVEYANCE**; **MORTGAGE**, 3.

**TITLE BY ESTOPPEL.**

See **HOMESTEAD**.

**EVIDENCE.** See **ADOPTION**, 5; **APPEAL AND ERROR**, 10, 11; **CARRIER**, 1; **MONOPOLY**, 4; **MORTGAGE**, 1; **NEW TRIAL**, 1; **WITNESS**, 6.

**JUDICIAL NOTICE.**

See **CRIMINAL LAW**, 2; **PLEADING**, 5.

1. The court takes judicial notice of the proceedings by which it acquires jurisdiction.

—Bond v. Pennsylvania Railroad Co. 195.

**EVIDENCE—Continued.****PRESUMPTION.**

See CONSTITUTION, 1; COURT (PROBATE) 2, 4; INCOMPETENT, 2; MASTER AND SERVANT, 4; NEW TRIAL, 2; RAILWAY, 8; WORK AND LABOR, 1-3.

2. Where a letter is deposited in the mails, postage paid and properly addressed, there is a strong presumption that it reached its destination in due course of mail. Applying this presumption, the jury was justified in finding that a cashier's check testified as having been mailed to defendant in payment of an assessment was received by it. The jury was also justified in believing that the check had been mailed.

—Ruder v. National Council of Knights and Ladies of Security, 431.

**BURDEN OF PROOF.**

See ASSIGNMENT, 4; EXCHANGE OF PROPERTY, 4; FRAUD, 3; INSURANCE, 9; MASTER AND SERVANT, 5; MECHANIC'S LIEN, 2; RAILWAY, 11.

**RELEVANT EVIDENCE.**

See WILL, 2.

**EVIDENCE OF REPUTATION.**

See ASSAULT AND BATTERY; INTOXICATING LIQUOR, 3.

**CUSTOM.**

See BROKER, 5; CUSTOM.

**MOTIVE.**

See CRIMINAL LAW, 3.

**COMPETENT EVIDENCE.**

See EVIDENCE, 7; WILL, 3-6.

3. The question of the competency of witnesses to testify to the value of land in condemnation proceedings rests largely in the discretion of the trial court.

—Potts v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 414.

**DEMONSTRATIVE EVIDENCE.**

See TRIAL, 1.

**ADMISSION.**

See WILL, 6.

4. Defendants offered proof that plaintiff's president stated, while in charge of the business of the corporation and in the course of negotiation on

**EVIDENCE—Continued.**

this subject, that it would cost from \$4,000 to \$5,000 to complete the manufacture and delivery of the material replevied. The evidence was proper as proof of an admission, and should have been received.

—Itasca Cedar & Tie Co. v. McKinley, 184.

5. Rejection of plaintiff's proffer of conversations had with defendant and his wife after maturity of the note in suit, involving admission of liability and tending to contradict and discredit their testimony, *held* reversible error.

—Svensson v. Lindgren, 386.

**DECLARATION OF PERSON IN POSSESSION.**

6. Declarations of a grantor in a deed which he delivers to a third person, with instructions to deliver it to the grantee upon the grantor's death, while in possession of the property, and after the delivery of the deed to the depository, to the effect that she retains the right to recall the deed, are inadmissible.

—Dickson v. Miller, 347.

**DECLARATION OF DECEDENT.**

See **APPEAL AND ERROR**, 12.

**DOCUMENTARY EVIDENCE.**

**FAILURE TO OFFER EVIDENCE.** See **CRIMINAL LAW**, 4.

**BANK STATEMENTS.**

See **BANK AND BANKING**, 2.

**BANK STATEMENTS EVIDENCE OF VALUE OF STOCK.**

7. The books of a bank and statements of its condition made by or under the direction of its president and general manager are competent evidence tending to prove the value of the shares of stock, and furnish a basis for expert testimony in an action against the president for the rescission of an exchange of land for such stock procured by misrepresentations of the condition of the bank, and of the actual value and book value of its shares of stock.

—Ludowese v. Amidon, 288.

**BOOKS OF ACCOUNT.**

8. Plaintiff's books of account, showing the amount and character of material sold and the cash transactions incident thereto, made in the usual course of business, and properly verified, were admissible in evidence, although part of the entries were made from reports of persons not employed by

**EVIDENCE—Continued.**

plaintiff, since these reports were produced and verified on the stand by the persons making them. The fact that some of the entries were made after suit was brought did not render them inadmissible.

—*Itasca Cedar & Tie Co. v. McKinley*, 184.

**MEMORANDUM.**

9. A memorandum of an inventory taken by two persons was made by one, on information called off to him by the other. The person making the memorandum was not produced as a witness; the other made no attempt to verify the memorandum. It was properly rejected.

—*Itasca Cedar & Tie Co. v. McKinley*, 184.

10. Memoranda made by two other persons of an inventory made in similar manner, but checked back and verified in a measure by both, *held* admissible under facts stated in the opinion, though only one of the persons participating in the inventory was produced as a witness.

—*Itasca Cedar & Tie Co. v. McKinley*, 184.

**PHOTOGRAPH.**

See **TRIAL**, 1.

11. It is within the discretion of a trial court to limit the undue introduction of cumulative evidence; but in this case it is held that certain photographs were not properly excluded on this ground, or upon the ground that they would not assist the jury. When a competent witness testifies that a photograph is a correct representation of the objects it purports to portray, it is not for the court to decide either that the witness is unworthy of belief, or that the photograph is misleading. In such case it is error for the court to exclude the photograph as misleading.

—*Mitton v. Cargill Elevator Co.* 66.

**PAROL EVIDENCE.**

12. Where there is a dispute whether a written agreement between the parties ever existed, and none is produced and none found, parol evidence of the contents of the alleged instrument, the proper foundation being laid, is admissible.

—*Huntoon v. Brendemuehl*, 54.

13. Writing executed by the parties in connection with the sale of a piano *held* neither such a complete contract of sale, nor to sufficiently recite the terms of a past sale, so as to preclude the purchaser from proving by parol evidence a condition attaching to the sale, not embodied in the writing, entitling him to return the property if not satisfactory.

—*French v. Yale*, 63.

**EVIDENCE—Continued.**

14. Where a written contract for the sale of personal property is complete in itself, and fails to disclose the existence of a warranty, parol evidence is not admissible for the purpose of proving a warranty.  
—Meland v. Youngberg, 446.
15. Whether the written contract expresses the entire agreement of the parties must be determined from the contract itself in the light of the subject-matter with which it deals, and of the circumstances attending its execution.  
—Meland v. Youngberg, 446.
16. Parol evidence is admissible for the purpose of proving fraud and deceit.  
—Meland v. Youngberg, 446.

**OPINION EVIDENCE.**

See **EVIDENCE, 7; FRAUD, 4.**

17. One who is not a medical expert may testify that he had a cold, and such testimony is a sufficient basis for expert opinion evidence as to the propriety of an operation under such conditions.  
—Swadner v. Schefeik, 269.

**EXPERT.**

See **CRIMINAL LAW, 5; EVIDENCE, 7, 18.**

**EVIDENCE OF COST.**

See **EVIDENCE, 4.**

**VALUE.**

See **BROKER, 4; EVIDENCE, 3.**

18. Defendant McKinley was the owner of cedar telegraph poles taken in replevin. Some he had purchased and some he had manufactured himself, participating in the work of getting the material out of the woods, taking it from the river and sorting and manufacturing it in the yard. With plaintiff's president he spent three weeks making an estimate of the material in piles. Still later, as the material was loaded out of the yard, he was on the ground nearly all the time. He was an experienced timber man and familiar with values. McKinley's evidence was competent.  
—Itasca Cedar & Tie Co. v. McKinley, 183.
19. Plaintiff offered proof that the actual cost of completing the manufacture and delivery of the material taken in replevin was \$12,000, and that this was the reasonable value thereof. Defendants offered to prove by defendant McKinley that the reasonable cost of such manufacture and de-

**EVIDENCE—Continued.**

livery did not exceed \$5,000. McKinley was familiar with the cost of manufacture. The evidence should have been received.

—*Itasca Cedar & Tie Co. v. McKinley*, 184.

**CIRCUMSTANTIAL EVIDENCE.**

See **CRIMINAL LAW**, 11.

**OMISSION TO CALL WITNESS.**

20. Omissions to call witnesses are often circumstances proper for consideration in weighing the evidence introduced; but cannot be substituted for affirmative proof.

—*Lewis v. Chicago Great Western Railroad Co.* 491.

21. Under the rule that the positive testimony of an unimpeached witness cannot be disregarded except for inherent improbability of the facts and circumstances disclosed, evidence held conclusive that compliance by the other company and its crew with the Federal act requiring a certain proportion of the air on the train to be connected would not have prevented the accident.

—*Campbell v. Canadian Northern Railway Co.* 246, 249.

**IMPUTED NEGLIGENCE.**

See **NEGLECT**, 6.

**EXCEPTIONS.** See **JUSTICE OF THE PEACE**, 3.

**EXCHANGE OF PROPERTY.** See **BROKER**, 4; **EVIDENCE**, 7; **MORTGAGE**, 1.

**EVIDENCE OF FRAUD.**

1. Action to cancel a deed and decree plaintiffs to be the owners of the land conveyed by it. The evidence examined and held to justify the finding of the trial court that the plaintiff was induced by the fraudulent representations of the defendant to execute a deed upon an exchange of lands.

—*Rudolphi v. Wright*, 24.

2. The fact that the plaintiff saw the lands before he traded is not conclusive against him on the issue of fraud.

—*Rudolphi v. Wright*, 26.

**ACTION TO RESCIND.**

3. Action to rescind exchange of land for defendants' bank stock and to cancel the conveyance. *Held*: Representations that the bank was not indebted related to a material fact. And representations as to actual value of its shares of stock made by its president and general manager were not



**EXCHANGE OF PROPERTY—Continued.**

mere trade talk which an intended purchaser had no right to rely on, since he could not well acquire, even by an examination of the books, the same knowledge as the president possessed of such value.

—Ludowese v. Amidon, 288.

4. Fraudulent misrepresentations being proven in an action to rescind, the defendant, who claims title from the one guilty of the fraud, has the burden of showing himself a bona fide purchaser without notice.

—Ludowese v. Amidon, 288.

**EXECUTION.** See **BANKRUPTCY**, 1, 2.

**EXECUTOR AND ADMINISTRATOR.**

In an action by a lien claimant to foreclose his lien, perfected for material supplied the contractor, the personal representative of the contractor, who died before the commencement of the action, is a proper, if not necessary, party to the action, and the determination in that action of the amount due the lien claimant, an incidental issue, is conclusive upon the estate of the deceased contractor.

—Shevlin-Carpenter Lumber Co. v. Taylor, 133.

**EXHIBIT.** See **COSTS**, 7.

**EXPERT.** See **EVIDENCE**, 7, 18, 19.

**EXPLOSIVE SUBSTANCE.** See **MASTER AND SERVANT**, 7, 9.

**EXPULSION OF MEMBER.** See **APPEAL AND ERROR**, 11; **INSURANCE**, 6-11; **PHYSICIAN AND SURGEON**, 2.

**FEDERAL EMPLOYER'S LIABILITY ACT.** See **APPEAL AND ERROR**, 8; **EVIDENCE**, 21; **MASTER AND SERVANT**, 10, 11.

**FEE.** See **PHYSICIAN AND SURGEON**, 1.

**FELLOW SERVANT.** See **MASTER AND SERVANT**, 11, 20, 21, 30, 31; **RAILWAY**, 5.

**FENCE.** See **ADVERSE POSSESSION**, 3; **BOUNDARY**, 2, 3.

**FIRE.** See **RAILWAY**, 12, 13.

**FORFEITURE.** See **LANDLORD AND TENANT**, 9; **MONOPOLY**, 5, 6; **SALE**, 5.

**FRAUD.** See **ATTACHMENT; EXCHANGE OF PROPERTY, 1, 3; MORTGAGE, 3; SALE, 1.**

**ACTION BY PURCHASER.**

See **VENDOR AND PURCHASER, 2.**

**ACTION BY PURCHASER—FOR DECEIT.**

1. If a purchaser relies in part upon his own examination as to the character and condition of the property, and in part upon the representations of the adverse party, and is deceived thereby to his injury, he may maintain an action for such deceit.

—Meland v. Youngberg, 447.

2. But, if the purchaser undertakes to and does investigate and determine the entire matter for himself, and is afforded an opportunity to make his investigation as full and complete as he chooses, and he then accepts the property, he cannot be heard thereafter to assert that he relied upon misrepresentations of the adverse party. In the instant case it is *held* that the admitted facts bring plaintiff within this rule.

—Meland v. Youngberg, 447.

**SAME—BURDEN OF PROOF.**

3. To maintain an action for deceit based upon false representations, it is incumbent upon plaintiff to show that he relied upon such representations, and was deceived thereby to his injury.

—Meland v. Youngberg, 446.

**SAME—OPINION EVIDENCE.**

4. It was not error to permit one of said agents to testify that he was working for defendants, over the objections that the answer was a conclusion.

—Jones v. Burgess, 266.

**VERDICT SUSTAINED BY EVIDENCE.**

5. In this action to recover damages for fraudulent representations claimed to have been made by defendants' agents in the sale of a stallion to plaintiffs, it is *held* the evidence sustains the verdict on the point that such fraudulent representations were made.

—Jones v. Burgess, 265.

6. The evidence sustains the verdict on the point that defendants sold the stallion to plaintiffs, and that the persons who made the fraudulent representations were defendants' agents in making the sale.

—Jones v. Burgess, 266.

## FRAUD—Continued.

## ACTION FOR FRAUD.

7. Evidence *held* to support the verdict, and that there were no errors in the exclusion or admission of evidence.  
—Magnuson v. Burgess, 374.

## DAMAGES.

8. Where a party defrauded in a sale elects to affirm the contract by retaining the property, the measure of his damages for the fraud is the difference between the actual value of the property and the price paid, together with such special damage as he may have suffered in consequence of the fraud.  
—Magnuson v. Burgess, 374.
9. Even though the property be sold for a particular use, the defrauded party, where he affirms the contract, can have no recovery for depreciation in the value of the use of the property accruing after discovery of the fraud.  
—Magnuson v. Burgess, 374.

## FRAUDULENT CONVEYANCE. See ATTACHMENT.

- The mortgage to appellant caused no legal fraud, and plaintiff is not estopped from asking its cancelation.  
—Burns v. Burns, 177.

## GARNISHMENT. See BANKRUPTCY, 1, 2.

## GARNISHMENT OF INSURER.

1. A guarantee insurance company *held* not liable as garnishee upon a judgment against the assured on an indemnified risk, where, at the time of service of the garnishee summons and when disclosure was made, it held a valid claim for policy premiums against assured in excess of such judgment, though it defended the main action; the rule of *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281, being inapplicable.  
—Truan v. London Guarantee & Accident Co. 339.

## PERFECTING LIEN BY JUDGMENT.

2. A creditor, by the garnishment of a debt, gets nothing more than an inchoate lien, and this inchoate lien can be perfected only by proceeding to judgment against the garnishee in the manner provided by statute.  
—Marsh v. Wilson Brothers, 254.

## GUARANTY.

## RELEASE OF GUARANTOR.

1. In an action on a promissory note guaranteed by one of the defendants it is *held* that the only question for submission to the jury was whether the defendant knew that one of the makers had been or was to be released from liability upon it; and that the evidence justifies the jury's finding that he did.  
—Greenberg v. Van Duzee, 411.
2. There were no errors affecting the issue submitted to the jury.  
—Greenberg v. Van Duzee, 411.

GUARDIAN AND WARD. See COURT (PROBATE) 5; INCOMPETENT, 1-3.

## HABEAS CORPUS.

## JURISDICTION OF COURT COMMISSIONER.

1. Court commissioners have jurisdiction to hear and determine habeas corpus proceedings. After examination or trial had, their powers are confined to an examination of the evidence for the purpose of ascertaining whether the decision of the magistrate was entirely unsupported thereby. If the record contains evidence reasonably tending to sustain it, the decision of the justice must stand.  
—State ex rel. v. Haugen, 457.
2. Certain matters of practice in habeas corpus proceedings, relating to jurisdiction of court commissioners and hearing on appeal, determined.  
—State ex rel. v. Haugen, 456.

## EVIDENCE.

3. The determination of a committing magistrate will not be disturbed on habeas corpus where the record discloses evidence reasonably tending to support it.  
—State ex rel. v. Haugen, 456.

HEAT. See LANDLORD AND TENANT, 4.

HEADLINE. See STATUTE, 11.

## HOMESTEAD.

- A warranty deed provided the grantor was to remain in possession of the premises conveyed during his lifetime, and that it was not to be recorded until after his death. The deed was not signed by the grantor's

**HOMESTEAD—Continued.**

wife, and was void as to the homestead included therein. The record contains no evidence of acts or words of the grantor influencing the conduct of the grantees, so as to create title in them by estoppel.

—Ekblaw v. Nelson, 335.

**HUSBAND AND WIFE.** See **HOMESTEAD; MORTGAGE, 1.**

**INCOMPETENT.** See **COURT (PROBATE), 5.**

1. A finding that the person for whom a guardian was asked was, by reason of old age and the loss and imperfection of mental faculties, incompetent to have the care and management of her person and estate, *held* sustained by the evidence.

—Wilkowske v. Lynch, 492.

2. Under G. S. 1913, § 7433, it is not necessary, in order to confer jurisdiction of the subject-matter, that a petition for the appointment of a guardian state that it is made by the county board, or by a relative or friend of the incompetent. It is sufficient if it be so made in fact. It does not affirmatively appear that it was not so made in fact. It is therefore presumed that the court had jurisdiction of the subject-matter. Any defects in the respect mentioned or in the facts set forth in the petition are waived, if not taken advantage of on the trial.

—Wilkowske v. Lynch, 492.

3. There was no abuse of discretion in selecting as guardians the persons appointed, rather than others suggested by the incompetent.

—Wilkowske v. Lynch, 492.

**INDICTMENT AND INFORMATION.** See **MONOPOLY, 1.**

Matters of description or inducement need not be stated with the same particularity in an indictment charging the commission of a crime, as the facts constituting the essential elements of the crime itself are required to be stated.

—State v. Minneapolis Milk Co. 34.

**INFANT.** See **INTOXICATING LIQUOR, 5, 6.**

**INHERITANCE TAX.** See **TAXATION, 16-18.**

**INJUNCTION.** See **PRINCIPAL AND AGENT, 1; MORTGAGE, 5.**

**GROUND FOR GRANTING.**

1. The claim that a jury in one case may not find the determinative facts

**INJUNCTION—Continued.**

the same way as a jury in another case is not a ground for equitable intervention and does not come under the definition of irreparable injury, or inadequate remedy at law.

—Davis v. Forrestal, 13.

**TO RESTRAIN THREATENED SUITS—QUESTIONS OF JURISDICTION.**

2. The contractors for the construction, under the drainage statutes, of a judicial county ditch and their surety who have been sued by the subcontractors for a balance due, bring this action against the subcontractors, the latter's surety, the county, and two owners of land adjacent to the ditch, who have threatened to sue plaintiffs for flooding their lands, to enjoin the subcontractors and each defendant from maintaining or bringing any action against plaintiffs on account of the ditch construction, and to have the various claims of the parties determined, alleging that the failure of the subcontractors to complete their contract is alone the cause of the injury to the landowners. *Held*: The contractors do not show irreparable injury, nor that their remedy at law is inadequate, nor does the plaintiff surety show any cause of action.

—Davis v. Forrestal, 10.

3. The sole ground for enjoining defendants from suing being to avoid a multiplicity of suits, the court may consider the number of suits which may be avoided, the statutory provisions for reducing this number, the efficiency of such provisions for giving plaintiffs adequate relief, the convenience and pecuniary loss of the parties, the apparent as well as anticipated issues between the different parties, and the importance of preserving to each the right of a jury trial, in determining whether jurisdiction should be entertained or refused.

—Davis v. Forrestal, 10.

4. When the rights of plaintiffs as to the different defendants and the rights of the latter as between each other are considered, it is clear that, even though the different rights may grow out of the same act, the issues of law and fact arising therefrom as between the individual parties are not the same, and equity should not assume jurisdiction in purely legal controversies based on such varied rights.

—Davis v. Forrestal, 10.

**DENIAL OF TEMPORARY INJUNCTION.**

5. The court, under the allegations of the complaint, being justified in refusing to entertain the action at all, clearly did not abuse its discretion in denying the application for temporary injunction.

—Davis v. Forrestal, 10.

## INJUNCTION—Continued.

## TO ENFORCE COVENANT.

6. A covenant not to engage in the same business in the same city is enforceable by injunctions, which should be freely granted.

—Holliston v. Ernston, 49.

## TO RESTRAIN PROSECUTION OF CRIMINAL ACTIONS.

7. The power of a court of equity to determine the validity of penal statutes, and to restrain criminal prosecutions thereunder when unconstitutional, where such would directly result in irreparable injury to property rights, is undoubted, the question being the propriety of its exercise in a given case.

—Milton Dairy Co. v. Great Northern Railway Co. 241.

8. Action by a creamery company engaged in manufacturing butter from cream to enjoin certain carriers from complying with, and the attorney general from enforcing, Laws 1913, p. 632, c. 433, regulating shipment of cream on railroads within the state, on the ground that such act is unconstitutional and compliance therewith would interfere with the supply of cream necessary to its business and that of other manufacturers similarly situated, thus causing great losses and eventual destruction of their business, *held* essentially one to enjoin the prosecution of criminal actions, and hence not maintainable as to any of defendants, notwithstanding the multiplicity of such actions against the carriers incident to enforcement of the statute; plaintiff's injury being merely consequential and incidental, without trespass against its property rights, and therefore insufficient to give it any proper status as plaintiff in the premises.

—Milton Dairy Co. v. Great Northern Railway Co. 239.

INSANE PERSON. See INCOMPETENT; WILL, 5.

## INSURANCE.

## CONSTRUCTION OF CONTRACT.

1. The language of the policy is of defendant's own choosing, and the confusion created thereby, and the apparent conflict in the different provisions, must be resolved against it to the end that the true intent of the parties may be given effect. The rule for the construction of such contracts, where ambiguous and uncertain, is most strongly against the company and favorable to the insured.

—Zeitler v. National Casualty Co. 483.

## INSURANCE—Continued.

## ACCIDENT INSURANCE.

2. In an action upon an accident insurance policy, the contract is construed, and *held* to obligate defendant to make monthly payments of indemnity during the disability of the insured, not exceeding the period covered by the policy.  
—Zeitler v. National Casualty Co. 478.
3. Defendant being under obligation to make monthly payments of indemnity and having waived formal notice of the injury or proof of disability, it is *held* that the action was not prematurely brought, notwithstanding a provision of the policy that no action could be commenced thereon until after the proofs have been furnished.  
—Zeitler v. National Casualty Co. 479.
4. The verdict of the jury to the effect that the disability for which plaintiff claims indemnity was the result of accidental injury, and that defendant waived strict compliance with the terms of the policy respecting notice and proof of injury, is sustained by the evidence.  
—Zeitler v. National Casualty Co. 479.

## MUTUAL BENEFIT INSURANCE.

## CHANGE OF BY-LAW AFTER ISSUE OF CERTIFICATE.

5. *Rosenstein v. Court of Honor*, 122 Minn. 310, 142 N. W. 331, followed and applied to the effect that a by-law of defendant adopted after a benefit certificate was issued, and changing the limit of time for bringing an action on the certificate, is not binding upon the certificate holder or his beneficiary. Laws 1907, c. 345, § 8 [G. S. 1913, § 3544], does not apply to benefit certificates issued before its enactment.  
—Ruder v. National Council of Knights and Ladies of Security, 432.

## EXPULSION OF MEMBER.

6. Rules and regulations of a fraternal benefit association concerning procedure for expulsion of members are valid and binding if not so grossly unfair as to be contrary to public policy; and an appeal within the order from an expulsion may be made a condition precedent to the right to resort to the courts.  
—Kulberg v. National Council of Knights and Ladies of Security, 437.

## SAME—APPEAL WITHIN THE ORDER.

7. To render the requirement of such an appeal operative, there must be a hearing in accordance with the laws of the order; but mere irregularities of procedure short of substantial denial of the hearing contemplated by the contract of the parties are remediable in the first instance only as provided therein.  
—Kulberg v. National Council of Knights and Ladies of Security, 438.  
124 M.—38.



## INSURANCE (MUTUAL BENEFIT)—Continued.

## SAME—HEARING WITHIN THE ORDER.

8. As against defendant's request for a directed verdict in an action upon a benefit certificate, evidence *held* sufficient to take the case to the jury on the question whether the hearing pursuant to which assured was expelled was such as to deprive the court of jurisdiction because no appeal was taken within the order.

—Kulberg v. National Council of Knights and Ladies of Security, 438.

## SAME—EVIDENCE.

9. The burden of establishing the fact of such hearing was on defendant.  
—Kulberg v. National Council of Knights and Ladies of Security, 438.
10. Evidence *held* insufficient to establish a valid expulsion, in that it indicated the order was based, in part at least, upon evidence taken at a time and place of which assured had no notice or else he was justified in so believing.  
—Kulberg v. National Council of Knights and Ladies of Security, 438.
11. Evidence *held* to show neither acquiescence in the order of expulsion nor abandonment of membership.

—Kulberg v. National Council of Knights and Ladies of Security, 438.

## TENDER OF DUES.

12. Defendant having clearly indicated its intention to refuse further recognition of assured's membership, subsequent tender of dues and assessments was not necessary to keep the certificate of membership in force; but a recovery would be subject to deduction thereof.

—Kulberg v. National Council of Knights and Ladies of Security, 438.

## BENEFICIARY HAS NO VESTED RIGHT PRIOR TO DEATH.

13. The beneficiary named in a benefit certificate issued by a fraternal beneficiary association acquires no vested interest thereunder until the death of the assured, and his expectant interest may be defeated at any time prior thereto by the proper substitution of another in his stead; but his interest becomes fixed and vested at such death, and cannot be defeated thereafter.

—Hughes v. Modern Woodmen of America, 458.

## CHANGE OF BENEFICIARY.

14. If the assured has done all the things required of him to make a change in beneficiary, his death before the issuance of the new certificate required by the by-laws will not defeat such change, in the absence of an

**INSURANCE (MUTUAL BENEFIT)—Continued.**

express provision in the contract specifying when the change shall take effect.

—Hughes v. Modern Woodmen of America, 458.

15. Where the contract provided that "no change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force," and the request for the change was not received until after the death of the member, the proposed change did not become effective.

—Hughes v. Modern Woodmen of America, 459.

**SERVICE OF PROCESS UPON FOREIGN ASSOCIATION.**

16. Section 3555, G. S. 1913, authorizing service of process upon a foreign beneficiary association by serving the same upon the insurance commissioner, provides "that no such service shall be valid or binding against any such association, when it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of such service." The summons in question required defendant to answer within 20 days from service thereof, and judgment by default was entered 22 days after such service, *held*: That such service and such judgment are not binding upon defendant and must be set aside.

—Oxmon v. Modern Woodmen of America, 390.

**INTENT.** See **BOUNDARY**, 4; **CRIMINAL LAW**, 2; **DEED**, 6; **INTOXICATING LIQUOR**, 2; **LIMITATION OF ACTION**, 1; **PUBLIC LAND**; **STATUTE**, 12; **WEIGHT AND MEASURE**, 1.

**INTEREST.** See **DAMAGES**, 2.

**INTERVENTION.** See **INJUNCTION**, 1; **MORTGAGE**, 5.

**INTOXICATING LIQUOR.****SALE IN VIOLATION OF CITY ORDINANCE.**

1. In a prosecution for the sale of intoxicating liquors without a license contrary to a city ordinance, it is *held* that the evidence does not support a judgment of conviction.

—State v. Weingarh, 124.

**SALE BY BARKEEPER DEEMED ACT OF EMPLOYER.**

2. The language of R. L. 1905, § 1565 (G. S. 1913, § 3191) which provides

**INTOXICATING LIQUOR—Continued.**

that the sale of liquor in any public drinking place by a clerk or bar-keeper authorized to sell liquor shall be deemed the act of the employer as well as that of the person making the sale, makes the act an offense, and imposes a penalty for violation of the law, irrespective of knowledge or criminal intent. The act is not unconstitutional as special legislation, under Const. art. 4, § 33, which provides that in all cases when a general law can be made applicable no special law shall be enacted.

—State v. Lundgren, 167, 168.

**SALE TO MEMBER OF PROHIBITED CLASS.**

3. Defendant was convicted of selling liquor to a public prostitute. *Held*: That to establish that the woman was a public prostitute, evidence is admissible that such is her general reputation.

—State v. Brand, 408.

4. The provision in Laws 1911, p. 102, c. 83, relating to written notice "forbidding the sale of liquor to any such spendthrift or improvident person," does not apply to the other classes of persons enumerated in the statute.

—State v. Lundgren, 166, 167.

**SALE TO MINOR.**

5. The act of the barkeeper in selling liquor to a minor is the act of the proprietor; the proprietor must pay the penalty for such sales made by his barkeeper; the delinquency of the barkeeper is the only evidence required to prove the guilt of the proprietor. The fact that the sale was made without the knowledge or assent of the proprietor, and contrary to his instructions, furnishes no defense.

—State v. Lundgren, 163.

6. To render a sale of liquor to a minor unlawful, it is not necessary that notice forbidding such sale should previously have been given.

—State v. Lundgren, 163.

**INVENTORY.** See EVIDENCE, 9.

**IRREPARABLE INJURY.** See INJUNCTION, 1, 2, 7, 8.

**JOINDER.**

**CAUSES OF ACTION.**

Causes of action against more than one defendant, based upon concurrent negligence of all of them, where the facts are identical as to time, place and result in causing decedent's death, may be united.

—Petcoff v. St. Paul City Railway Co. 531.

JUDGMENT. See APPEAL AND ERROR, 1, 2; SALE, 7.

MAY BE BROADER THAN PRAYER FOR RELIEF.

1. Plaintiff *held* entitled to such relief, legal or equitable, as the facts proved required, regardless of the fact that such might be broader than the prayer, except that greater damages cannot be recovered, without amendment.

—Hoffman Motor Truck Co. v. Erickson, 279, 281.

VACATING DEFAULT.

2. It is the duty of the courts to relieve a party from default, if he furnishes any reasonable excuse for his neglect and shows a defense of fair merit, no substantial prejudice appearing to the other side from the delay.

—Dr. Shoop Family Medicine Co. v. Oppliger, 535.

3. The trial court did not err in refusing to open a default judgment, where the proposed answer and defendant's affidavit showed neither frankness nor merit in the application to open.

—Klein v. W. & D. Railroad, Warehouse & Storage Co. 530.

4. Application in May to open a default judgment for the price of medicines sold to defendant's husband upon his written order. The summons was served in October and judgment was entered in the succeeding February. The affidavit in support showed a prior judgment against the husband for the same bill; defendant's delivery of the summons to her husband in October and reliance on him to take proper steps to protect her; belief on his part that a second judgment could not be entered for the same bill; and defendant's absence from the state until the spring, when she first learned of the judgment, and no interest on defendant's part in the drug store run by her husband. *Held*: The court did not abuse its discretion in permitting defendant to answer, and permitting the judgment to stand as a lien against her property until the result of a trial of the issues.

—Dr. Shoop Family Medicine Co. v. Oppliger, 535.

CONCLUSIVENESS.

See EXECUTOR AND ADMINISTRATOR; WILL, 3.

BAR TO SUBSEQUENT ACTION.

5. Where there is no election by plaintiff as to whether he will rely on an express contract for the payment of services or upon *quantum meruit*, and a general verdict is returned in favor of defendant, a judgment rendered thereon is *res judicata*, and constitutes a complete bar to a

**JUDGMENT—Continued.**

subsequent action for the reasonable value of the services, even though no evidence thereof was presented on the trial of the first action.

—Kinzel v. Boston & Duluth Farm Land Co. 416.

6. The rule applicable to the situation is that the former judgment concludes the parties as to all issues that were or could have been litigated therein.

—Kinzel v. Boston & Duluth Farm Land Co. 416.

7. The primary question of plaintiff's employment was necessarily litigated in the former action, for it was expressly in issue therein, and for this reason *Rossman v. Tillyen*, 80 Minn. 160, 83 N. W. 42, is distinguishable.

—Kinzel v. Boston & Duluth Farm Land Co. 416.

8. A judgment entered upon the dismissal of an action on motion of the defendant at the close of the plaintiff's testimony for insufficiency of evidence is not *res judicata* and the matter may be relitigated in a subsequent action.

—County of Morrison v. Lejouburg, 496, 497.

**JUDGMENT NOTWITHSTANDING VERDICT. See APPEAL AND ERROR, 16.****MOTION FOR DIRECTED VERDICT PREREQUISITE.**

Judgment notwithstanding the verdict can be granted only when a motion for a directed verdict was made at the trial, and a motion to dismiss an appeal from probate court is not equivalent to such motion.

—Knight v. Martin, 192, 195.

**JURISDICTION. See CERTIFIED CASE; COURT (PROBATE), 1-4; EQUITY, 1, 2; HABEAS CORPUS, 1, 2; INCOMPETENT, 2; INJUNCTION, 3, 4; INSURANCE, 8; JUSTICE OF THE PEACE, 1, 2; PLEADING, 5.**

It is a rule of universal application that a party may, by consent, give jurisdiction over his person, and it follows as a consequence that, where there is any defect of jurisdiction, or it has ceased, he may waive the objection, and does so when he takes or consents to any step in the cause which assumes that jurisdiction exists or continues.

—Quaker Creamery Co. v. Carlson, 150.

**JURY. See TRIAL, 10-12.****CHALLENGE TO PANEL.**

1. The fact that individual jurors summoned were prejudiced is not ground

**JURY—Continued.**

for a challenge to the panel. This objection must be raised by a challenge of individual jurors for bias. See G. S. 1913, § 9225.

—State v. Lundgren, 166.

2. The discharge of the whole or part of a jury panel, and the summoning of a new one, rests in the sound discretion of the trial court. The fact that special veniremen were summoned from only seven out of 36 towns, cities, and villages in the county, and that eight were summoned from one village and others from points near to it, is not ground for challenge to the panel; no bad faith, fraud, or oppression being established, and it not appearing that the persons selected were not as a class fair-minded jurors.

—State v. Lundgren, 162.

3. Where a part of a jury panel was discharged and a new panel summoned, the fact that the court retained in service part of the original panel which at the time was serving upon a case, was not error.

—State v. Lundgren, 166.

**PEREMPTORY CHALLENGE.**

See APPEAL AND ERROR, 9.

**CHARGE TO JURY.**

See MONOPOLY, 4; TRIAL, 2-9.

**SEPARATION OF JURORS.**

See CRIMINAL LAW, 12.

**JUSTICE OF THE PEACE.**

1. Where defendant filed an answer after discontinuance of a justice court action caused by adjournment, on plaintiff's motion on the return day, for more than one week (G. S. 1913, § 7522), he thereby waived objection to jurisdiction, though the answer was a nullity, so far as regards admission of proofs thereunder, because not filed within the time allowed by law; and on the adjourned day the justice properly denied defendant's motion to dismiss for lack of jurisdiction.

—Quaker Creamery Co. v. Carlson, 147.

2. An unverified answer in justice court is a nullity so far as regards admission of proofs thereunder against proper objection, but it would scarcely be claimed that if a defendant should cause one defective in this regard to be filed it would not constitute an appearance, and thus give the court jurisdiction where the summons had not been duly served.

—Quaker Creamery Co. v. Carlson, 150.

**JUSTICE OF THE PEACE—Continued.**

3. Nor was it error to reject proofs under the answer; an exception, furthermore, being necessary to save this point for review.

—Quaker Creamery Co. v. Carlson, 148.

**LANDLORD AND TENANT.****FARM LEASE.**

See CUSTOM.

**LEASE.**

See BAILMENT, 1; WATER AND WATERCOURSE.

**EXTENSION OF LEASE.**

1. *Held*, that the evidence was insufficient to sustain the claim that a payment of more than was due for the last two months of the tenancy operated to extend the lease for the period of another year.

—Kees v. Christensen, 230.

**TERMINATION OF LEASE BY LANDLORD.**

2. Upon the bankruptcy of the lessee, the lessor had the right to terminate the lease and enter the premises, but no right to re-enter without terminating the lease.

—Galbraith v. Wood, 210.

**INJURY TO THIRD PERSON—COVENANT OF LANDLORD TO REPAIR.**

3. Where the landlord by the terms of the lease expressly contracts to keep the leased premises in repair, a legal duty thereby arises on his part toward third persons lawfully upon the premises to perform the contract, and a negligent failure to do so, which results in injury to such third person, renders him liable for such damages as may have been suffered in consequence of his negligence.

—Glidden v. Goodfellow, 101.

**SAME—COVENANT TO KEEP HEATED.**

4. The rule applies to a case where the landlord contracts to keep the leased premises properly heated, and his negligent failure to perform the contract renders him liable to a servant of the tenant who suffers injury in consequence of the neglect.

—Glidden v. Goodfellow, 101.

**ADVANCE PAYMENT OF RENT.**

5. In a proposal to take a 15-year lease of a hotel, the lessee offered to pay

## LANDLORD AND TENANT—Continued.

the lessor the sum of \$20,000 as an advance payment on rent, and agreed to keep such advance good during the first five years of the term, with the privilege of reducing at the rate of \$6,666.66 per year for the third, fourth, and fifth years of the term. The proposal was accepted, the advance payment made, and the lease executed. Within six months after the lessee went into possession, the lessors terminated the lease because the tenant had been adjudged a bankrupt, as they had the right to do under the terms of the lease. It is *held*: On the pleadings and evidence, the \$20,000 was not paid as security, or as a bonus or independent consideration for the lease, but such payment was made as an advance payment of rent to become due for the third, fourth, and fifth years of the term.

—Galbraith v. Wood, 210.

6. In this case, the lessee or his trustee in bankruptcy is not entitled to recover of the lessor any part of the advance payment so made.

—Galbraith v. Wood, 211.

7. Where rent has been paid in advance, under an agreement that it shall be so paid, and the lessor re-enters for conditions broken, he is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent is paid.

—Galbraith v. Wood, 211.

## RECOVERY OF RENT.

8. Upon the termination of a lease for conditions broken, the lessor is entitled to rent which had previously become due, but not, in the absence of an express agreement, entitled to recover rent subsequently to become due.

—Galbraith v. Wood, 210.

9. A stipulation in the lease that a re-entry by the lessor for conditions broken shall not work a forfeiture of the rent due or to become due is not invalid because providing a penalty for the lessee's breach of conditions.

—Galbraith v. Wood, 211.

LEGISLATURE. See CONSTITUTION, 1, 2; STATUTE, 1-3, 5, 12.

LETTER. See CRIMINAL LAW, 4; EVIDENCE, 2; TRIAL, 11.

LICENSE.

## AMOUNT OF FEE.

1. A license fee may be of sufficient amount to include the expense of issu-



**LICENSE—Continued.**

ing the license and the cost of the necessary police surveillance connected with the business or calling licensed; when the vocation or business is one which the municipality has the power to regulate, the license fee may be sufficiently large to work a restraint.

—Village of Minneota v. Martin, 500.

**FEE FOR AUCTIONEER.**

2. It is not made to appear that a \$25 per day license fee for auctioneers, which villages are authorized to impose by chapter 138, Laws of 1905 [G. S. 1913, § 1269], is so large as to be beyond the scope of legislative discretion.

—Village of Minneota v. Martin, 498.

**LIEN.** See **CHATTEL MORTGAGE**, 1, 2; **EXECUTOR AND ADMINISTRATOR**; **GARNISHMENT**, 2; **MECHANIC'S LIEN**; **STATUTE**, 14; **TAXATION**, 9-15.

**LIMITATION OF ACTION.** See **DEATH BY WRONGFUL ACT**, 1; **INSURANCE**, 5; **MUNICIPAL CORPORATION**, 19.

1. The provisions of the code relating to the commencement of actions must be construed as a whole and so as to give effect to the intention to provide a single uniform course of procedure which shall apply alike to all civil actions.

—Bond v. Pennsylvania Railroad Co. 196.

2. Plaintiff's cause of action did not accrue until appellant refused to release the mortgage or until she asserted its validity.

—Burns v. Burns, 177.

**LOG AND LOGGING.** See **WATER AND WATERCOURSE**.

**MALPRACTICE.** See **PHYSICIAN AND SURGEON**, 3.

**MANDAMUS.** See **APPEAL AND ERROR**, 3.

**MAP.** See **COSTS**, 6.

**MASTER AND SERVANT.**

**EXISTENCE OF RELATION.**

1. Plaintiff was injured by the breaking of one of the timbers in a scaffold erected by carpenters in the construction of a house under a contract with defendant. Plaintiff had entered into a contract with defendant

**MASTER AND SERVANT—Continued.**

to furnish and put in place the tin valleys and gutters for the house at a specified price, and was injured while using the scaffold in the performance of his contract. It is *held*, the relation of master and servant did not exist between plaintiff and defendant, and the rule of safe place to work does not apply.

—Resnikoff v. Friedman, 343.

2. Action by contractor upon plaintiff's building, who was injured by use of scaffold erected by an independent contractor. *Held*: Defendant owed plaintiff the duty of exercising ordinary care to avoid injuring him. The scaffold was erected by the carpenters, who were not servants of defendant, but independent contractors. The rule of *respondeat superior* does not apply. Defendant did not select the timber that went into the scaffold, but it was selected by the carpenters out of the timber furnished by defendant for the erection of the house. Defendant was not bound to inspect the timber so selected by the carpenters for the scaffold, and was not guilty of a breach of his duty to use ordinary care to avoid injuring plaintiff.

—Resnikoff v. Friedman, 343.

**WHEN THE RELATION TERMINATES—TRANSFER OF BUSINESS.**

3. As between the parties, the relation of master and servant does not necessarily terminate by the sale and transfer by the master to a third person of the property and business in connection with which the relation arose and exists.

—Benson v. Lehigh Valley Coal Co. 222.

4. Where there is no actual change in the management of the business, and it is continued in the same general way after the sale, by the same servants and employees, and the servants are in no way expressly or otherwise informed of the transfer and the consequent change of proprietors, the relation is presumed to continue for a reasonable time, and the master remains liable to them to the same extent as though no sale or transfer had taken place.

—Benson v. Lehigh Valley Coal Co. 222, 226.

5. The burden to show knowledge on the part of the servant is upon the master.

—Benson v. Lehigh Valley Coal Co. 223, 226.

**DEPOSIT OF WAGES.**

See DAMAGES, 1.

**LIABILITY FOR INJURY TO SERVANT.**

See MUNICIPAL CORPORATION, 20.

## MASTER AND SERVANT—Continued.

6. Decedent was in the employ of defendant for several years. Defendant transferred its business to a third person on March 1. The management of the business thereafter continued as before. He was fatally injured on March 13, by a defective instrumentality furnished by defendant. It is *held*, that the question whether decedent knew of the change of ownership was one of fact for the jury.

—Benson v. Lehigh Valley Coal Co. 223.

## LIABILITY OF RAILWAY COMPANY FOR INJURY TO SERVANT.

7. Evidence *held* sufficient to sustain a finding charging defendant railroad company with notice of excavating operations being conducted on and near its right of way by another company, through a subcontractor, and also of the manner in which the work was being done, including the use of dynamite, so as to impose upon defendant the duty of warning plaintiff, its employee, before putting him at work on a semaphore pole located dangerously near the place where the blasting was going on.

—Gillespie v. Great Northern Railway Co. 1.

## PROXIMATE CAUSE.

8. Jury *held* justified in finding that plaintiff's injury from a blast followed in natural sequence from defendant's breach of duty in failing to warn him.

—Gillespie v. Great Northern Railway Co. 1.

9. The causal connection was not broken by the fact that the excavation workmen, though knowing of plaintiff's presence, negligently failed to warn him before exploding the blast by which he was injured; such negligence being a mere incident to that of defendant, or, at most, a mere contributing cause.

—Gillespie v. Great Northern Railway Co. 1.

## UNDER EMPLOYER'S LIABILITY ACT.

10. As to such other company the track on which its crew was operating the train was "its" within the provisions of the Federal Employer's Liability Act, though owned by its codefendant, and under the doctrine of *Floody v. Chicago, St. P., M. & O. Ry. Co.* 109 Minn. 228, 123 N. W. 815, it was responsible for its codefendant's negligence in leaving the switch open or unlocked.

—Campbell v. Canadian Northern Railway Co. 246, 250.

11. Evidence in an action by a freight brakeman to recover damages sustained while jointly engaged with a fellow brakeman in switching

**MASTER AND SERVANT—Continued.**

movements, by being caught between the engine tender and cars left on another track, considered, and *held* to warrant findings that, under the circumstances disclosed, plaintiff had the right to rely on the other brakeman's statement that the cars were clear for the engine to pass, and that the making thereof constituted negligence attributable to defendant under the Federal Employer's Liability Act.

—Skaggs v. Illinois Central Railroad Co. 503.

**ACTION UPON FOREIGN STATUTE.**

12. Action, based upon the laws of Wisconsin, to recover for personal injuries. *Held*, that the questions as to negligence and contributory negligence were properly submitted to the jury, and that the evidence sustains the verdict.

—Marfia v. Great Northern Railway Co. 466.

**EVIDENCE—CAUSE OF ACCIDENT CONJECTURAL.**

13. Evidence in an action by a railroad brakeman to recover damages for injuries received from being caught between the engine tender and the end of certain poles projecting from a car which he had just uncoupled, or was uncoupling, *held* insufficient to sustain a verdict in his favor, in that thereunder it was merely conjectural whether the accident was due to some movement of the engine, which would have involved liability on defendant's part, or from the settling of the poles or cars, which would not.

—Lewis v. Chicago Great Western Railroad Co. 487.

**SAFE PLACE TO WORK.**

See **MASTER AND SERVANT**, 1.

**SAFE INSTRUMENTALITY.**

See **MASTER AND SERVANT**, 14, 16, 17, 22; **MUNICIPAL CORPORATION**, 20.

**PLACE AND APPLIANCES FOR WORK—INSPECTION BY SERVANT.**

14. It is one of the absolute duties of a master to exercise reasonable care in providing his servants with safe instrumentalities and a reasonably safe place in which to work. Where the master expressly imposes upon the servant the duty of inspecting the instrumentalities with which he performs his work, as to that particular servant the master is perhaps relieved from responsibility.

—Benson v. Lehigh Valley Coal Co. 227, 229.

15. The question whether decedent, the injured servant, was required by the duties of his employment to inspect the machinery and appliances with

**MASTER AND SERVANT—Continued.**

and about which he performed his duties, and to keep and maintain the same in repair, was, on the evidence, one of fact for the jury.

—Benson v. Lehigh Valley Coal Co. 223.

16. Plaintiff was in the employ of defendant as painter and decorator. He used a scaffold, consisting of a plank stretched upon ladders. Planks and ladders were furnished by defendant. There is evidence that in the course of the work it became necessary to use a plank of different length from any that had been furnished, and that defendant directed plaintiff's foreman to go to an employee of defendant in charge of another job and that such employee would furnish one. The foreman acted accordingly and the plank was so furnished. It was unfit for the purpose by reason of a knot near the center. This knot was somewhat obscured by lime, plaster, and dirt. *Held*: The duty of defendant to furnish suitable plank for scaffolding was absolute, and could not be delegated. The evidence is sufficient that this plank was, in contemplation of law, furnished by defendant, and that defendant was negligent in not furnishing a suitable plank.

—Falkenberg v. Bazille & Partridge, 19, 22.

17. This duty was the same whether the plank was furnished to plaintiff by defendant directly from its shop or by another at defendant's direction, so long as plaintiff had no choice in the matter of its selection. Its furnishing was equally the act of defendant in either case.

—Falkenberg v. Bazille & Partridge, 22.

**WARNING TO SERVANT.**

See MASTER AND SERVANT, 7, 8.

18. It is settled that the master's duty is to warn the servant of dangers not naturally incident to the employment, including those arising from extraneous sources, which the former should in the exercise of reasonable care and diligence know of, and of which the latter has no knowledge or notice. The law imposes this duty to warn on the master absolutely for the protection of the servant from injury, and he must either perform it personally or see that it is performed by a representative.

—Gillespie v. Great Northern Railway Co. 4.

**FAILURE TO WARN.**

19. In a personal injury action, the evidence is *held* sufficient to support a finding of the jury that the defendant was negligent in failing to warn the plaintiff, an inexperienced employee, of the danger incident upon the use of a machine with which he was working, and to instruct him as to an understood method of avoiding or lessening such danger.

—Novak v. Great Northern Railway Co. 141.

## MASTER AND SERVANT—Continued.

## FELLOW SERVANT.

See MASTER AND SERVANT, 11, 30, 31; RAILWAY, 5.

20. Conceding that a fellow servant of the plaintiff was negligent in his method of blocking a bolt-driving machine, and that his negligence had a causal connection with the injury, the case presented was one of the contributing or concurring negligence of a fellow servant, and a requested instruction by the defendant ignoring this was properly refused.

—Novak v. Great Northern Railway Co. 142.

21. If the negligence of the defendant in furnishing the jacks combined with the negligence of a fellow servant in adjusting them so as to make a case of concurring negligence causing the injury, the plaintiff could recover notwithstanding the negligence of his fellow servant.

—Schultz v. City of St. Paul, 257.

## ASSUMPTION OF RISK.

See TRIAL, 6.

22. A servant assumes the risks ordinarily incident to the employment in which he is engaged. If he freely and voluntarily encounters a risk, he has only himself to thank if harm comes. He also, in some cases, assumes the risk incident to use of defective instrumentalities if he acquiesces in their use, even though their use has been imposed upon him through the negligence of his employer. He does assume such risk when he knows or ought to know the actual character and condition of the defective instrumentalities and when he also understands or by the exercise of ordinary observation ought to understand, the risk to which he is exposed by its use.

—Falkenberg v. Bazille & Partridge, 22.

23. As to appreciation of the risk, as distinguished from knowledge of the physical facts and conditions, the question is, did he understand the risk to which he was exposed, or ought he, by the exercise of ordinary observation, to have understood it. Rase v. Minneapolis, St. P. & S. M. Ry. Co. 107 Minn. 260, 120 N. W. 360.

—Falkenberg v. Bazille & Partridge, 23.

24. The question of whether plaintiff assumed the risk of the use of a defective plank provided by the master was for the jury. The test is whether the defect was known to or plainly observable by him, and whether he understood, or by the exercise of ordinary observation ought to have understood, the risk incident to its use. In view of the manner in which this defect was obscured by lime, plaster, and dirt, the question of assumption of risk was one of fact.

—Falkenberg v. Bazille & Partridge, 20.

## MASTER AND SERVANT—Continued.

25. The question of the assumption of the risk was not one of law.  
—Schultz v. City of St. Paul, 257.

## CONTRIBUTORY NEGLIGENCE.

26. The question of contributory negligence is wholly a question whether plaintiff exercised the care of an ordinary prudent man in observing or failing to observe the condition of the plank, and in the manner in which he used it. This was a question of fact for the jury. While plaintiff was an experienced workman, he was not held to the same duty of inspection of material furnished for his use as was his employer. Inspection was not in the particular line of his duty. He had a right to assume that his employer had acted with due care in selecting material for the purpose in hand.  
—Falkenberg v. Bazille & Partridge, 20.

## LIABILITY FOR INJURY TO THIRD PERSON.

## See AUTOMOBILE, 1.

27. The complaint in a personal injury action alleged that defendants negligently drove against plaintiff; also that at the time the relation of master and servant existed between defendants, the servant being in charge of the rig. *Held* to state a cause of action against the master.  
—Bolstad v. Armour & Co. 155.
28. Whether the owner of an automobile is responsible for injuries resulting from the negligence of the person operating it, is determined by the rules which govern the relation of master and servant. His liability rests upon the proposition that the principal is responsible for the wrongful or negligent acts of his agent or servant, committed while acting under his express or implied authority and furtherance of his business. He is not liable for the acts of such agent or servant committed while the latter is engaged exclusively upon his own affairs.  
—Ploetz v. Holt, 172.
29. If a servant be loaned by one employer to another, the servant, for the time being, and for the purpose designated, must cease to be a servant of the one and become the servant of the other. For the time being and for the purpose designated, he must be engaged in furthering the business of the master to whom he is loaned, and not in furthering the business of the master who loans him. The right to control and direct him in the performance of his duties, including the right to dispense with his services, must pass from the one to the other.  
—Tuttle v. Farmer's Handy Wagon Co. 208.
30. A servant loaned by one employer to another, while engaged in the busi-

**MASTER AND SERVANT—Continued.**

ness for which he was loaned, is a fellow servant of the other employees engaged in such business.

—Tuttle v. Farmer's Handy Wagon Co. 207.

31. Defendant Clow purchased a silo from defendant, the Farmer's Handy Wagon Co., under a contract whereby the company agreed to furnish a man to superintend its erection. In accordance with the contract such superintendent was furnished by the company, and the other workmen including plaintiff were furnished by Clow. Through the alleged negligence of the superintendent plaintiff sustained injuries. *Held:*

- (1) Whether the injuries resulted from negligence on the part of the superintendent was a question for the jury.
- (2) That the superintendent had not been "loaned" to Clow but remained the servant of the company and hence was not a fellow servant of plaintiff.

—Tuttle v. Farmer's Handy Wagon Co. 204.

**INJURY TO SERVANT OF TENANT.**

See LANDLORD AND TENANT, 4.

**MAXIM.**

Equity regards that as done which ought to be done.

—Fiske v. Lawton, 86.

**MECHANIC'S LIEN. See CORPORATION, 5, 6.****PROPERTY SUBJECT TO LIEN.**

1. Leased realty is subject to a mechanic's lien for improvements made at the instance of the lessee, where the lessor knows such are being made and without excuse fails to give or post the written notice of irresponsibility provided for by G. S. 1913, § 7024.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

**NOTICE BY OWNER TO PREVENT LIEN.**

2. The burden of proving the giving or posting of notice is upon the defendant landowner.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

**SLIGHT EXCESS IN AMOUNT DISREGARDED.**

3. Slight excess in the lien account filed, due to clerical error in adding the items, *held* harmless.

—Minneapolis Plumbing Co. v. Arcade Investment Co. 317.

**EVIDENCE.**

4. The findings of the trial court in an action to foreclose a mechanic's lien 124 M.—39.



**MECHANIC'S LIEN—Continued.**

to the effect that a delay in the delivery of certain items of material, delivered some time after the substantial completion of the contract, was not for the wrongful purpose of extending the time within which to perfect the lien, are sustained by the evidence.

—Shevlin-Carpenter Lumber Co. v. Taylor, 132.

**MEMORANDUM.** See EVIDENCE, 9, 10.

**MILK AND CREAM.** See INJUNCTION, 8; MONOPOLY, 2.

**MONEY HAD AND RECEIVED.** See COSTS, 2.

**MONOPOLY.****CRIMINAL PROSECUTION—CONSTRUCTION OF INDICTMENT.**

1. An indictment under R. L. 1905, § 5168, charging that defendants, several persons and corporations, were "jointly and severally" engaged in a certain occupation, and in violation of the statute formed a combination for the purpose of increasing the price of their products, construed, and held to charge that defendants were to some extent independent dealers, and not jointly associated in business as one concern.

—State v. Minneapolis Milk Co. 34.

**COMBINATION TO RAISE PRICE.**

2. A combination of several persons and corporations, all independent dealers in milk and cream, to raise and increase the price thereof, is a violation of the statute, though the increased price was necessary to afford them a profit.

—State v. Minneapolis Milk Co. 35.

3. A violation of the statute by the formation of a combination to do the acts prohibited cannot be excused by facts tending to justify the act, and which would have been proper and legal had the members thereof acted independently of the combination.

—State v. Minneapolis Milk Co. 35.

**EVIDENCE.**

4. Evidence held to support the verdict, that no errors were committed by the trial court in its rulings upon the admission or exclusion of evidence, or in its charge to the jury.

—State v. Minneapolis Milk Co. 35.

**PUNISHMENT OF DOMESTIC CORPORATION.**

5. For the violation of sections 5168 and 5169, R. L. 1905, by entering into

**MONOPOLY—Continued.**

a combination with others to raise the price of commodities offered for sale by those forming the combination, the domestic corporation is not subject to the penalty imposed by section 5168, but only to the penalty of forfeiture of its charter as prescribed by section 5169.

—State v. Minneapolis Milk Co. 35.

6. The original statute, Laws 1899, p. 487, c. 359, imposed both fine and forfeiture of charter, but the revision of 1905 (sections 5168, 5169) changed the statute in that respect, thereby making the penalty of forfeiture of the charter the exclusive punishment as to domestic corporations.

—State v. Minneapolis Milk Co. 35.

**MONUMENT.** See **BOUNDARY**, 1.

**MORTGAGE.** See **BAILMENT**, 2; **LIMITATION OF ACTION**, 2.

**MORTGAGE WITHOUT CONSIDERATION—MORTGAGEE WITHOUT RIGHT TO REDEEM.**

1. Appellant and her husband made a deed to the latter's brother of land to which she held the legal unrecorded title; the husband took the deed to the brother and delivered it, upon receiving a surrender of the equities of the brother to land, the legal title whereof was in appellant's husband, and the balance of the agreed consideration in money; and thereupon a mortgage without any consideration was executed to appellant to protect the mortgagors against their own improvidence. *Held*, that it was not error to exclude evidence concerning appellant's purchase of the land so conveyed, nor as to her secret instructions to her husband respecting the delivery of the deed.

—Burns v. Burns, 176.

2. The evidence sustains the finding that a mortgage was without consideration, and the legal conclusion that the mortgagee named in such mortgage has not the right to redeem from the foreclosure of a prior mortgage.

—Burns v. Burns, 176.

3. The mortgage to appellant caused no legal fraud. There was no evidence of existing nor of subsequent creditors. The scheme was not legal fraud on future creditors. Plaintiff is not estopped from asking its cancellation.

—Burns v. Burns, 177, 182.

4. Where a second mortgage was given and recorded, without any consideration and as a protection for an improvident mortgagor, and at the mortgagee's death passed to his wife, she likewise holds it for the same purpose, and can claim no lien against the mortgaged premises.

—Burns v. Burns, 178, 181.

## MORTGAGE—Continued.

## ACTION TO ENJOIN REDEMPTION.

5. Plaintiff and intervener are entitled to maintain an action to enjoin defendant from redeeming from the foreclosure of a mortgage by virtue of a pretended mortgage, because of their interest in the land to which the mortgage relates.

—Burns v. Burns, 177.

MOTION. See APPEAL AND ERROR, 5, 16; JUDGMENT NOTWITHSTANDING VERDICT. PRINCIPAL AND AGENT, 2.

## MOTION FOR MORE SPECIFIC ALLEGATION.

See PLEADING, 3.

MOTIVE. See CRIMINAL LAW, 3.

MULTIPLICITY OF SUITS. See EQUITY, 2; INJUNCTION, 3, 8.

## MUNICIPAL CORPORATION.

1. A city has no constitutional or vested right to any particular set of regulatory laws. The legislature can change or repeal them.

—State ex rel. v. County Board of St. Louis County, 131.

## CLASSIFICATION ON BASIS OF POPULATION.

See STATUTE, 1-3.

## INCORPORATION OF VILLAGE.

2. Chapter 145, Laws 1885, relating to the incorporation of villages, and providing that all villages theretofore incorporated under the general statutes of the state should be governed by the provisions thereof, though repealed by section 5536, R. L. 1905, nevertheless, by force of section 698, R. L., remains in force as to existing villages, which were not re-incorporated as provided for by section 699, R. L. 1905.

—Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy, 107.

3. Held, following State v. Cornwall, 35 Minn. 176, that by chapter 14, Sp. Laws 1876, the village of Le Roy became incorporated as a village under and subject to the provisions of the general village act of 1875, the same being chapter 139, general laws of that year, and therefore comes within the scope of section 2, c. 145, Laws 1885.

—Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy, 107.

MUNICIPAL CORPORATION—Continued.

VIOLATION OF ORDINANCE.

See CRIMINAL LAW, 2; INTOXICATING LIQUOR, 1.

CITY OF MINNEAPOLIS.

REMOVAL OF OFFICER.

4. The charter of the city of Minneapolis permits the city council to remove the supervisor of the city waterworks at will.  
—Sykes v. City of Minneapolis, 73.
5. Such charter provision does not violate section 2 of article 13 of the Constitution.  
—Sykes v. City of Minneapolis, 73.

CITY OF MINNEAPOLIS.

CONTRACT WITH RAILWAY ULTRA VIRES.

6. The city of Minneapolis has no power to enter into a contract with a company operating a commercial railway, by which the city agrees to bear part of the expense of strengthening a city bridge which the railway company desires to cross with its cars, where the bridge is already of sufficient strength and construction to accommodate general travel, and the sole purpose of the improvement is to permit the operation of such railway cars thereover.  
—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. City of Minneapolis, 351.

RATIFICATION VOID.

7. Plaintiff desired to cross this bridge in order to meet the line of the Minneapolis Street Railway Company. The city, in lieu of permitting the plaintiff to cross the bridge, directed the City Railway Company to extend its line across the bridge to plaintiff's terminus. The public also has used the bridge for general travel. These facts impose no liability upon the city, since the contract was beyond the corporate power of the city and was not susceptible of ratification, but was wholly void.  
—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. City of Minneapolis, 351.

PENSION OF DISABLED FIREMAN.

8. A determination by the association that a member thereof previously entered upon the pension rolls has fully recovered from his disability is not final and conclusive where the member had no notice and was not afforded an opportunity to be heard upon the question.  
—Stevens v. Minneapolis Fire Department Relief Assn. 381.

**MUNICIPAL CORPORATION—Continued.**

9. The rights of the parties are analogous to and controlled by the principles of law applicable to mutual benefit societies.

—*Stevens v. Minneapolis Fire Department Relief Assn.* 381.

10. Action to recover pension and to determine plaintiff is a pensioner. Findings of the trial court in favor of plaintiff *held* sustained by the evidence.

—*Stevens v. Minneapolis Fire Department Relief Assn.* 381.

**EMINENT DOMAIN.**

See **EMINENT DOMAIN**, 1.

**STREET ACROSS RAILWAY.**

See **APPEAL AND ERROR**, 13; **RAILWAY**, 4.

11. The evidence supports the verdict to the effect that a proposed new street over the railroad right of way is a public necessity.

—*Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy*, 107.

**ASSESSMENT FOR LOCAL IMPROVEMENT.**

See **TAXATION**, 9–15.

**ASSESSMENT OF BENEFITS ON BASIS OF FRONTAGE.**

12. It does not appear that the village council did not ascertain or determine the amount of benefits to defendant's property. An assessment of abutting property on the basis of frontage is not illegal in an improvement of this character.

—*State v. Burnes*, 471.

**USE OF STREETS.**

13. In the absence of statutory prohibition, a pedestrian has the right to walk upon any part of a street or highway. Of course, he must use the care which the ordinary prudent person would use in the same place and under the same conditions.

—*Bolstad v. Armour & Co.* 159.

14. The relative rights of pedestrians and vehicles in a public highway are equal and reciprocal. One has no more rights than the other, and each is obliged to act with due regard to the movements of others entitled to be upon the street. Neither is called upon to anticipate negligence on the part of the other.

—*Bolstad v. Armour & Co.* 159.

15. An instruction suggesting that a pedestrian has not the right to walk

**MUNICIPAL CORPORATION—Continued.**

on any part of a street except the sidewalks and the crosswalks at the intersection of streets, was properly refused.

—*Bolstad v. Armour & Co.* 155.

16. A request to charge the jury that, if the left wheels of the vehicle which struck plaintiff were to the left of the center of the street, but the horse and thill which struck plaintiff were to the right of the center of the street, there could be no recovery for driving on the wrong side of the street, was properly denied. Negligence of the defendants and contributory negligence of the plaintiff in the use of the street cannot be measured by a foot rule.

—*Bolstad v. Armour & Co.* 158.

**SIDEWALK.**

See CONSTITUTION, 5.

17. The council had the right to postpone the construction of the sidewalk from October, 1909, until the first of May following. Such postponement was not an abandonment of the work, and it was not necessary to give property owners another opportunity to build the walk themselves.

—*State v. Burnes*, 471.

**LIABILITY FOR INJURY TO SERVANT.**

18. In a personal injury suit, it is *held*, that the evidence made it a question for the jury whether the defendant city, which was engaged in raising a steel bridge by the use of hydraulic jacks, was negligent in furnishing such jacks for such use.

—*Schultz v. City of St. Paul*, 257.

19. Under R. L. 1905, § 768, and the charter of the City of St. Paul, § 690, prior to the enactment of Laws 1913, c. 391 (G. S. 1913, §§ 1786-1789), effective July 1, 1913, the limitation of one year after injury in which to bring suit did not apply when the claim was based upon a negligent failure of the city to observe a duty imposed upon it by law as an employer.

—*Schultz v. City of St. Paul*, 257.

20. It was the duty of the city, just as of anyone engaged in like work, to furnish reasonably safe and proper instrumentalities.

—*Schultz v. City of St. Paul*, 259.

**NO POWER TO AID RAILROAD.**

21. A city has no power, in the absence of legislative authority to appropriate money in aid of railroad building. And it has no power to aid

**MUNICIPAL CORPORATION—Continued.**

a railroad company in performing the duties and obligations which the construction and maintenance of its road imposes.

—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. City of Minneapolis, 354.

**NEGLIGENCE.** See **APPEAL AND ERROR**, 8; **AUTOMOBILE**, 1, 2; **CARRIER**, 5; **DEATH BY WRONGFUL ACT**, 1; **LANDLORD AND TENANT**, 3, 4; **MASTER AND SERVANT**, 2, 7, 9-12, 16, 19, 20, 21, 27, 28, 31; **MUNICIPAL CORPORATION**, 13, 16, 18; **RAILWAY**, 5-9, 12; **TRIAL**, 2, 8, 9.

**FAILURE TO GUARD DANGEROUS MACHINERY.**

1. The evidence was sufficient to justify a finding that defendant was negligent in failing to provide a railing on a stairway leading to an engine room below, and in failing to guard dangerous machinery therein. Plaintiff's intestate was not an employee of defendant, but was requested by it to go down into the engine room and turn off the engine. *Held*, that defendant owed him the duty to use ordinary care in relation to guarding the stairway and the machinery. Whether chapter 288, Laws 1911, is for the benefit of any but employees, is not decided.

—Mitton v. Cargill Elevator Co. 65.

**PROXIMATE CAUSE.**

2. An entirely independent and unrelated cause must be one which not only comes between the original cause and the injury in point of time, but must turn aside the natural sequence of events and produce a result which would not otherwise have followed.

—Gillespie v. Great Northern Railway Co. 7.

3. The evidence did not leave the cause of death a matter of speculation or conjecture, but was sufficient to justify submitting to the jury the question whether defendant's negligence was the proximate cause of the death.

—Mitton v. Cargill Elevator Co. 66.

4. Where a cause is shown that might produce a given accident, and the fact appears that an accident of that particular character did occur, it may be a warrantable inference, in the absence of a showing of other causes, that the one known was the operative agency in bringing about the result. Plaintiff was not bound to negative all possible circumstances which would excuse the defendant.

—Mitton v. Cargill Elevator Co. 71.

**CONTRIBUTORY NEGLIGENCE.**

See **APPEAL AND ERROR**, 8, 14; **CARRIER**, 4, 6, 10; **MASTER AND SERVANT**, 12, 20, 26; **RAILWAY**, 6, 7, 10, 11.

NEGLIGENCE—Continued.

5. It did not conclusively appear that plaintiff's intestate was guilty of contributory negligence or that he assumed the risk.  
—Mitton v. Cargill Elevator Co. 66.

CONCURRENT NEGLIGENCE.

See JOINDER; MASTER AND SERVANT, 20, 21; RAILWAY, 5.

IMPUTED NEGLIGENCE.

6. Evidence tending to show negligence on the part of the driver of the team frightened by an automobile was properly excluded, as such negligence is not imputed to plaintiff, a passenger.  
—Ploetz v. Holt, 169.

NEW TRIAL. See APPEAL AND ERROR, 15-17; CRIMINAL LAW, 12; EMINENT DOMAIN, 7.

1. Certain irrelevant evidence offered by the plaintiff *held* not to be prejudicial so as to require a new trial.  
—Rudolphi v. Wright, 25.
2. Action on promissory note. Counterclaim for services. Substantial verdict in favor of defendant. New trial granted, because due weight was not given to the presumption arising from the giving of the note and the verdict was not justified by the evidence.  
—Sullivan Lumber Co. v. Thorn, 532.
3. There was no abuse of discretion in denying a new trial on the ground of misconduct of the jury.  
—Evertson v. McKay, 261.

NONRESIDENT. See ACTION, 2.

NOTICE. See APPEAL AND ERROR, 2; CORPORATION, 5, 6; DRAIN, 3; INTOXICATING LIQUOR, 4, 6; MASTER AND SERVANT, 7; MECHANIC'S LIEN, 1, 2; RAILWAY, 6; TAXATION, 5-8; TRIAL, 7; VENDOR AND PURCHASER, 3, 4.

JUDICIAL NOTICE.

See CRIMINAL LAW, 2; EVIDENCE, 1; PLEADING, 5.

REDEMPTION FROM TAX SALE.

See TAXATION, 5-8.



**OFFICER.****REMOVAL OF OFFICER.**

See **MUNICIPAL CORPORATION**, 4, 5.

1. As a general proposition, the power of removal of public officers is incident to the power of appointment, but this applies more particularly to appointive officers, and not to those elected by the people. The subject of removal of all officers is within legislative control, and where that body prescribes a manner and method of removal it is exclusive.  
—*Sykes v. City of Minneapolis*, 77, 78.
2. There can be no doubt that all elective municipal officers come within the provisions of section 2 of article 13 of the state Constitution, and that such may not be removed except for malfeasance or nonfeasance in office. But it is clear that this constitutional provision does not embrace an office created by an ordinance of a city to assist in carrying on the business of a public utility.  
—*Sykes v. City of Minneapolis*, 77.

**ORDINANCE.** See **CRIMINAL LAW**, 2.

**PARENT AND CHILD.** See **ADOPTION**, 1-7; **SPECIFIC PERFORMANCE**, 1, 2.

**PARTIES TO ACTION.** See **CORPORATION**, 1, 2; **EXECUTOR AND ADMINISTRATOR**; **PRINCIPAL AND AGENT**, 1, 2.

**PARTNERSHIP.** See **MONOPOLY**, 2.

**PASSENGER.** See **CARRIER**, 3-9.

**PAYMENT.** See **ATTACHMENT**; **LANDLORD AND TENANT**, 1, 5-7; **SALE**, 4-6.

**PENALTY.** See **LANDLORD AND TENANT**, 9.

**PENSION.** See **CONSTITUTION**, 3; **MUNICIPAL CORPORATION**, 8-10.

The ordinary pension, such as that granted by the Federal government to dependent soldiers of the Civil War is a mere gratuity or bounty which may be taken away at any moment, but a member of the Minneapolis Fire Department Relief Association in good standing is entitled as a matter of legal right to a place on its pension rolls whenever disabled to the extent specified in its by-laws. The fund from which the pension is paid is contributed by the state and the city and from dues and assessments imposed upon its members.

—*Stevens v. Minneapolis Fire Department Relief Assn.* 383, 384.

**PERSONAL PROPERTY.** See **POSSESSION**; **STATUTE**, 14; **TAXATION**, 1-3.

**PETITION.** See **COURT (PROBATE)** 5; **INCOMPETENT**, 2; **WILL**, 6.

**PHOTOGRAPH.** See **COSTS**, 6; **EVIDENCE**, 11; **TRIAL**, 1.

**PHYSICIAN AND SURGEON.** See **EVIDENCE**, 17.

**FEES OF STATE BOARD OF MEDICAL EXAMINERS.**

1. License fees received by the secretary and treasurer of the State Board of Medical Examiners under Laws 1905, c. 236, (G. S. 1913, §§ 4973, 4974), and R. L. 1905, §§ 2302, 2303, *held* properly retained by the board, notwithstanding R. L. 1905, § 66, requiring executive officers to pay into the state treasury all fees and charges received by them, except when otherwise expressly provided by law.

—*State v. Fullerton*, 151.

**MEDICAL SOCIETY—TRIAL OF MEMBER.**

2. The Hennepin County Medical Society, a voluntary association of physicians and surgeons, the by-laws of which provide for the trial of a member for a criminal offense or for misconduct, and provide a penalty by discipline or expulsion, may try a member for acts which were necessarily involved in a criminal charge, tried in the district court, and of which the member was acquitted.

—*Miller v. Hennepin County Medical Society*, 314.

**MALPRACTICE.**

See **WITNESS**, 3.

3. In this, an action for malpractice, it is *held*, there was evidence, sufficient to take the case to the jury, tending to show that certain operations performed by defendant ought not to have been performed at the time they were and under the conditions that then existed.

—*Swadner v. Schefcik*, 269.

**PRIVILEGE OF PHYSICIAN.**

See **WITNESS**, 2-5.

**PLAT.** See **COSTS**, 6.

**PLEADING.**

**COMPLAINT.**

See **CORPORATION**, 4; **CRIMINAL LAW**, 2; **DAMAGES**, 13; **DRAIN**, 6; **EQUITY**, 1; **JUDGMENT**, 1; **MASTER AND SERVANT**, 27.

**PLEADING—Continued.**

1. The objection that a complaint does not state a cause of action against defendants may be raised prior to judgment.

—Milton Dairy Co. v. Great Northern Railway Co. 243.

**ALLEGATION IN THE ALTERNATIVE.**

2. In an action for conversion of personal property, an allegation in the alternative that one or the other of two defendants converted the goods, but which one plaintiff is unable to determine, states no cause of action against either defendant.

—Casey Pure Milk Co. v. Booth Fisheries Co. 117.

**MOTION FOR MORE SPECIFIC ALLEGATION.**

3. The proper practice, where a general allegation of permanent injury resulting from an assault and battery is deemed insufficient, is to move the court for more specific allegations.

—Evertson v. McKay, 260.

4. Where defendant permits the complaint to remain unchallenged when its allegations are not sufficiently specific, he must be deemed to have waived the objection that it does not definitely point out the nature of the injury for which damage is sought.

—Evertson v. McKay, 263.

**PLEADING AND PROOF.**

See **BROKER**, 3.

**ANSWER.**

See **CORPORATION**, 4; **EJECTMENT**; **REPLEVIN**, 1.

**REPLY.**

See **SALE**, 3.

5. Where the proceedings by which jurisdiction of a defendant was acquired are a part of the record in the case, it is not necessary to allege in the reply that these proceedings have been taken, to have the court take notice of them. As it was not necessary to allege that the proceedings had been taken, the point that the reply merely states a conclusion of law is not well taken.

—Bond v. Pennsylvania Railroad Co. 197, 198.

**JUDGMENT ON THE PLEADINGS.**

See **EJECTMENT**.

**POPULATION.** See **STATUTE**, 1-3.

**POSSESSION.** See **ADVERSE POSSESSION**, 1, 2; **BAILMENT**, 2; **DEED**, 2; **EJECTMENT**.

When and under what circumstances, if at all, the owner using no more force than is necessary, may forcibly repossess himself of personal property which has been wrongfully and unlawfully taken from him by a thief or other wrongdoer, quære? The question is not presented by the facts of this case.

—Evertson v. McKay, 261.

**POWER OF APPOINTMENT.** See **TAXATION**, 16, 17.

**PREFERENCE.** See **ATTACHMENT**.

**PRESUMPTION.** See **CONSTITUTION**, 1; **COURT (PROBATE)** 2, 4; **INCOMPETENT**, 2; **MASTER AND SERVANT**, 4; **NEW TRIAL**, 2; **RAILWAY**, 8; **WORK AND LABOR**, 1-3.

**PRINCIPAL AND AGENT.** See **BROKER**, 1, 2.

**UNDISCLOSED PRINCIPAL.**

1. Plaintiff, being a party to the contract to sell a transfer business and not to engage in the same business, had the right to maintain the suit for an injunction against the sellers, though he made the purchase for an undisclosed principal and had no interest in the transaction except under a contract with his principal to employ him if he made the purchase.

—Holliston v. Ernston, 49.

2. If an agent contracts in his own name without disclosing his principal, the other contracting party is entitled to hold either, but not both. If he sue both, however, the only remedy of defendants is by motion to compel him to elect. They cannot move a dismissal as to either. The option as to which shall be held rests with plaintiff, not with defendants.

—Stevens v. Wisconsin Farm Land Co. 421.

**PRINCIPAL AND SURETY.** See **INJUNCTION**, 2.

**RELEASE OF SURETY.**

See **BILLS AND NOTES**; **GUARANTY**, 1.

**PROPERTY.**

A membership in the Duluth Board of Trade is property.

—State v. McPhail, 398.

PROXIMATE CAUSE. See APPEAL AND ERROR, 8; MASTER AND SERVANT, 8, 9, 13; NEGLIGENCE, 2-4.

PUBLIC LAND. See EMINENT DOMAIN, 2-6.

#### SALE OF PUBLIC SCHOOL LAND.

The obvious purpose of the constitutional restriction (art. 8, § 2) that "no portion of said lands shall be sold otherwise than at public sale" was to prevent private sales, and effectually to preclude secret transactions with speculators. In other words, the intention was to surround the disposal of the lands with publicity, thus avoiding private or secret dealings, which often result disastrously to the best interests of the state. A reading of all the provisions of the section of the Constitution in which this restriction is found tends to the conclusion that it was contemplated that title to such lands might be acquired otherwise than at public outcry, for it is therein provided that the proceeds of the sales "or other disposition" shall become a perpetual fund for the benefit of the schools of the state.

—Independent School District of Virginia v. State, 278.

PUBLIC POLICY. See ADOPTION, 3; CONSTITUTION, 2; INSURANCE, 6.

RAILROAD AND WAREHOUSE COMMISSION. See RAILWAY, 1, 2.

RAILWAY. See EVIDENCE, 21; MASTER AND SERVANT, 7, 8, 11; TRIAL, 2.

#### POWERS OF RAILROAD COMMISSION.

1. The Railroad and Warehouse Commission has authority in a proper case to order defendant to remove its station building one-half mile from its present location up to the village which it serves.

—Railroad and Warehouse Commission v. Great Northern Railway Co. 533.

2. Where defendant has failed to stop its trains before passing a junction not provided with an interlocking device, thereby violating the statute (G. S. 1913, § 4406), the Railroad and Warehouse Commission has the right to order such trains to be brought to a stop before the junction, until some other sufficient provision has been made to avoid the danger of collision.

—Railroad and Warehouse Commission v. Great Northern Railway Co. 534.

#### WHEN A STREET RAILWAY IS A COMMERCIAL RAILWAY.

3. A railway company which carries no passengers from street to street

**RAILWAY—Continued.**

within a city, but, with the city as a terminus, operates from place to place, stopping and gathering business only at terminal or regular way stations, is a commercial and not a street railway. The fact that its motive power is electricity instead of steam is of no consequence.

—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. City of Minneapolis, 353.

**EXTENSION OF STREET.**

4. The entire cost and expense of extending the new street across the right of way, including necessary planking over the railroad tracks, was properly imposed upon the railroad company; following *State v. St. Paul, M. & M. Ry. Co.* 98 Minn. 380, 108 N. W. 261, and *Chicago, M. & St. P. Ry. Co. v. City of Minneapolis*, 115 Minn. 460, 133 N. W. 169, and overruling upon this point *State v. District Court for Hennepin County*, 42 Minn. 247, 44 N. W. 7.

—*Chicago, Milwaukee & St. Paul Railway Co. v. Village of Le Roy*, 107.

**STOPPING TRAIN AT JUNCTION.**

See **RAILWAY, 2.**

**CONTRACT WITH RAILWAY ULTRA VIRES.**

See **MUNICIPAL CORPORATION, 6, 7.**

**POWERLESS TO AID RAILWAY COMPANY.**

See **MUNICIPAL CORPORATION, 21.**

**LESSOR LIABLE FOR INJURY TO LESSEE'S SERVANT.**

5. Defendant, over whose track the train was being operated by another company, under a traffic arrangement, with the latter's own crew, could not escape liability on the theory that the accident was due to the neglect of one of plaintiff's fellow servants to keep a proper lookout; the case thus presented being merely one in which the latter's negligence concurred with that of defendant in producing the result complained of.

—*Campbell v. Canadian Northern Railway Co.* 245.

**DUTY TO PASSENGER'S COMPANION.**

See **CARRIER, 7-10.**

**ACCIDENT AT GRADE CROSSING.**

6. A railway grade crossing is a place of danger, and the track itself a warning. It must be approached circumspectly by persons purposing

## RAILWAY—Continued.

to cross, and they are charged with notice of probability of approaching trains at all times. If the crossing may properly be termed "dangerous," and they are familiar with the surroundings, additional care is required. One about to drive a team across must look and listen for approaching trains, but need not necessarily halt when none are seen or heard. Yet he must alertly use his sight and hearing to discern their approach and specially peculiar circumstances may require a stop.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 371.

7. Travelers may, within reasonable limits, act upon the assumption that due care will be exercised in management of trains and giving of crossing signals.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 371.

8. When the evidence conclusively shows the colliding train must have been visible from the point where the injured person claims to have looked and listened, a conclusive presumption arises either that he failed to look and listen, or else heedlessly disregarded the knowledge thus obtained and negligently encountered obvious danger.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 371.

9. Evidence, in an action to recover damages for injuries sustained by the driver of a wagon in a railway crossing accident, considered, and held sufficient to take the case to the jury as to defendant's negligence with reference to warning signals, speed of the train, and necessity for lights thereon.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 368.

10. Taking into account the time of the accident, obstructions to view, dark color of the unlighted train, with like background, and testimony with regard to failure to give warning signals of the train's approach, together with other circumstances disclosed, plaintiff could not be held guilty of contributory negligence as a matter of law, though he did not stop his team before attempting to cross.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 369.

11. The burden of proof upon the issue of contributory negligence was controlled by the rule in this state, notwithstanding the accident occurred in another state.

—Jenkins v. Minneapolis & St. Louis Railroad Co. 369, 373.

## FIRE.

12. Plaintiffs were the owners of furniture, wearing apparel, and ornaments in rooms in a hotel that was destroyed by fire. It is held: The evidence justifies the finding that defendant was negligent in running a

**RAILWAY—Continued.**

locomotive over and cutting a hose laid across its track on a street, and thus prevented extinguishing the fire.

—*Bodkin v. Great Northern Railway Co.* 219.

13. The evidence does not show that plaintiffs would have suffered any loss from smoke had the hose not been cut.

—*Bodkin v. Great Northern Railway Co.* 219.

**REDEMPTION.** See **MORTGAGE**, 2; **TAXATION**, 5-8.

**REFORMATION OF INSTRUMENT.**

The purchasers, having made a valid contract with the owners to buy the property for a stipulated price, then knowing that such price included the broker's commission, are not in a position to ask a reformation of the contract, so as to reduce the purchase price to the net price given in the first instance by the owners to the broker.

—*Stumpf v. Norton*, 94.

**REGISTRATION OF TITLE.** See **TAXATION**, 9, 11.

**REPLEVIN.** See **ASSIGNMENT**, 3; **EVIDENCE**, 18, 19; **SALE**, 6, 7.

**DEMAND BEFORE SUIT.**

1. Where, in an action of replevin, the answer demands the restoration of the property to defendant, a demand before suit is not necessary.

—*C. W. Raymond Co. v. Kahn*, 426.

**EVIDENCE.**

2. Plaintiff's president testified that the estimate made by himself and McKinley amounted to \$35,000 or \$40,000, and that it covered all but about 6,000 pieces. Defendants offered to prove that it covered not more than half of the yard. The evidence was proper and should have been received.

—*Itasca Cedar & Tie Co. v. McKinley*, 183.

**RESIDENCE.** See **ACTION**, 2.

**RES JUDICATA.** See **JUDGMENT**, 5-8.

**RESPONDEAT SUPERIOR.** See **MASTER AND SERVANT**, 2.

**RESTRAINT OF TRADE.** See **CONTRACT**, 1; **INJUNCTION**, 6.

124 M.—40.



## SALE.

## SALE OF STATE SCHOOL LAND.

See EMINENT DOMAIN, 6; PUBLIC LAND.

## RESCISSION BY BUYER.

1. Where the sale of property is effected by fraud and deceit, the defrauded party may rescind the contract on discovering the fraud, or affirm the same and retain the property.

—Magnuson v. Burgess, 374.

## RESCISSION OF CONTRACT—TIME FOR RESCISSION.

2. In this action it did not conclusively appear from the evidence that defendant had lost his right to rescind a contract of purchase for breach of warranty.

—J. G. Cherry Co. v. Larson, 252.

## ACTION FOR PRICE—BREACH OF WARRANTY.

3. In action upon promissory notes given in part payment of the purchase price of a full-blood Percheron horse, in which defendant interposed the defense of a warranty and breach thereof, it is *held* (1) that the reply admits the warranty substantially as alleged in the answer, and (2) that the evidence sustains the verdict to the effect that there was a breach of the warranty, in that the horse delivered to defendant was not a Percheron animal, and that defendant was damaged in consequence of the breach to the extent of the difference in value between the horse delivered and the one agreed to be delivered.

—Wilson v. Danderand, 120.

## CONDITIONAL SALE.

See EVIDENCE, 13.

4. In a so-called conditional sale contract by which the seller retains title to the property and the right to recover it on default of the buyer, when the seller exercises this right and retakes the property, he cannot thereafter maintain an action to recover unpaid instalments of the purchase price.

—C. W. Raymond Co. v. Kahn, 426.

## PARTIAL PAYMENTS.

5. Whether partial payments made by the buyer are forfeited, in the absence of language to that effect in the contract, when the seller recovers the property, is not decided.

—C. W. Raymond Co. v. Kahn, 426.

## SALE—Continued.

## RETURN OF PARTIAL PAYMENTS.

6. It is not a condition precedent to the maintenance by the seller of an action in replevin to recover the property that he return or tender to the buyer partial payments made or notes given for unpaid instalments.

—C. W. Raymond Co. v. Kahn, 426.

7. Where a seller retains title to the property sold and the right of recovery on default of the buyer, and the property is taken in an action of replevin, in case the buyer has given promissory notes for the unpaid instalments, he may demand that they be returned to him before judgment is entered in the replevin action. The court can protect his rights by ordering their return by the seller.

—C. W. Raymond Co. v. Kahn, 431.

SCHOOL AND SCHOOL DISTRICT. See EMINENT DOMAIN, 1, 3-6; PUBLIC LAND.

SEDUCTION. See TORT.

SELF DEFENSE. See ASSAULT AND BATTERY.

SET-OFF AND COUNTERCLAIM. See BROKER, 6.

After the bailment the bailee became bankrupt and a trustee was appointed.

The evidence does not definitely show whether the loss of or damage to the bailed property was before or after the bailee's bankruptcy. It is held that in a suit on the note, transferred by the trustee to the plaintiff, the bailor can set off damages sustained through a breach of the contract of bailment, whether the damage occurred while the property was in the possession of the bailee or of his trustee in bankruptcy.

—Huntoon v. Brendemuehl, 55.

SETTLED CASE. See APPEAL AND ERROR, 3, 4.

SIDEWALK. See CONSTITUTION, 5; MUNICIPAL CORPORATION, 12.

SITUS. See TAXATION, 18.

SPECIAL LEGISLATION. See INTOXICATING LIQUOR, 2; STATUTE, 8.

## SPECIFIC PERFORMANCE.

## AGREEMENT TO LEAVE PROPERTY TO ADOPTED CHILD.

1. In actions for specific performance of agreements to leave property to a

**SPECIFIC PERFORMANCE—Continued.**

child taken from its parents, there must be a full and satisfactory proof of the fact of a contract and of its terms before there can be specific performance. If the contract is sufficiently proved and is definite in terms, and there has been performance by plaintiff and a peculiar and domestic relation has been assumed, pursuant to which services incapable of pecuniary valuation have been rendered, specific performance will be decreed.

—Brasch v. Reeves, 116.

2. In an action for the specific performance of an alleged oral agreement by parties now deceased to leave their property to the plaintiff at their death, it is *held* that the evidence justifies, but does not require, a finding that such an agreement was made; that it does not justify a finding that a part only of their property was the subject of the agreement: and that under the evidence the court might have found either that there was no agreement warranting specific performance, or that, if there was such an agreement, it included all of the property owned at their death, but could not find that there was an agreement embracing less than all.

—Brasch v. Reeves, 114.

**SPENDTHRIFT.** See **INTOXICATING LIQUOR**, 4.

**STATE BOARD OF MEDICAL EXAMINERS.** See **PHYSICIAN AND SURGEON**, 1.

**STATUTE.** See **CARRIER**, 8-10; **CRIMINAL LAW**, 10; **EMINENT DOMAIN**, 3-6; **INTOXICATING LIQUOR**, 2, 4; **MONOPOLY**, 5, 6; **TAXATION**, 2-4.

**RESTRAINING PROSECUTION UNDER PENAL STATUTES.**

See **INJUNCTION**, 7.

**FOREIGN STATUTE—LIMITATION OF ACTION.**

See **DEATH BY WRONGFUL ACT**, 1.

**CLASSIFICATION ON BASIS OF POPULATION.**

1. Section 36, article 4, of the Constitution of Minnesota, permits the classification of cities for legislative purposes into four classes, on a basis of population. The legislature, by R. L. 1905, § 746, divided the cities of the state for legislative purposes into four classes, as permitted by the Constitution. It is within the constitutional power of the legislature to provide that, for the purpose of classification of cities, population shall be determined according to the state census alone.

—State ex rel. v. County Board of St. Louis County, 126.

## STATUTE—Continued.

2. The constitutional right of the legislature to pass a law fixing a test by which population is to be determined carries with it the right to change the test, and this right is not taken away or suspended by the fact that its exercise may result in shifting some city from one class into another.  
—State ex rel. v. County Board of St. Louis County, 126.
3. The legislature has no power to adopt a means of determining population which is arbitrary and designed merely as an evasion of the Constitution; but we cannot say that the statute adopted in this case, making the state census alone the test of population, whereas under the previous law resort was had to the latest census, state or Federal, was wholly arbitrary, evasive or without reason.  
—State ex rel. v. County Board of St. Louis County, 126.

## TITLE AND SUBJECT OF ACT.

4. A section of a statute providing for compensation of clerks of district courts for duties placed upon them by the act, is not unconstitutional because the title of the act is merely "an act regulating the collection, indexing, preservation and use as evidence, of vital statistics."  
—Gard v. County of Otter Tail, 137.
5. The purpose of Constitution, art. 4, § 27, is to prevent combining in one act, for log rolling or other improper purposes, matters pertaining to diverse and unconnected subjects, to provide for apprising the legislature and the public through the title of the act, of the general subject-matter with which it deals; and to secure a separate consideration of each distinct legislative measure. This constitutional provision is to be construed liberally and all doubts solved in favor of a sufficiency of the title of an act adopted by the legislature.  
—State v. People's Ice Co. 308.
6. The title to chapter 250, p. 347, Laws 1911, held to sufficiently comply with the constitutional requirement that no law shall embrace more than one subject, which shall be expressed in its title.  
—Gard v. County of Otter Tail, 136.
7. Section 4 of the act providing for compensation of clerks of the district court of certain counties for the duties thereby imposed held not to extend or amend chapter 423, Sp. Laws 1891, fixing the compensation of the clerk of the district court of Otter Tail county.  
—Gard v. County of Otter Tail, 136.
8. Section 5 of the act excludes from the operation of section 4 all counties having a population of 100,000. It is held that the classification is not arbitrary or unreasonable, but, on the contrary, has reasonable basis

## STATUTE—Continued.

for its support, and therefore is not a violation of the provisions of the Constitution prohibiting special legislation.

—Gard v. County of Otter Tail, 136.

9. Chapter 156, p. 197, Laws of 1911 (G. S. 1913, §§ 4611-4623), establishing a department of weights and measures, does not violate the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title."

—State v. People's Ice Co. 307.

## REVISED LAWS 1905—SUBDIVISION OF SUBJECT MATTER.

See ACTION, 3.

10. Unlike the revision of 1836, in which the several chapters were enacted separately, the revision of 1905 was presented for adoption as a single act and was enacted as an entirety. The titles into which the various chapters had previously been subdivided were eliminated and the sections were numbered consecutively throughout the entire act. The laws as revised were divided into 5 parts and were subdivided into 108 chapters.

—Bond v. Pennsylvania Railroad Co. 202.

11. The act did not subdivide the chapters except into sections, but provision was made for inserting appropriate headlines. The commissioner charged with the duty of editing the act for the printer was authorized "to change headlines; to insert, alter or omit subheads." Laws 1905, c. 218. § 3. The headlines were not a part of the act and were inserted merely as a matter of convenience.

—Bond v. Pennsylvania Railroad Co. 202.

## CONSTRUCTION OF LANGUAGE.

12. The language of a statute is to be construed in harmony with the ordinary rules of grammar, except only when such construction will lead to a result obviously contrary to the intention of the legislature.

—State v. Minneapolis Milk Co. 35.

13. Where a statute is perfectly clear and unambiguous, a doubt or ambiguity in its meaning cannot be raised by reference to the original statute of which the new is a revision.

—State v. Minneapolis Milk Co. 39.

14. Sections 7036, 7037, G. S. 1913, giving a lien to anyone who at the request of the owner or legal possessor of any personal property transports it from one place to another or stores it as a warehouseman or bailee, refers to animate and inanimate property in the same terms and cannot be held to mean one and not the other.

—Monthly Instalment Loan Co. v. Skellet Co. 145, 146.

STATUTE—Continued.

15. Section 9010, G. S. 1913, being a penal statute must be strictly construed.  
—Street v. Chicago, Milwaukee & St. Paul Railway Co. 521, 522.

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TACKING. See BANKRUPTCY, 1.

TAXATION. See WORDS AND PHRASES, 7.

PERSONAL PROPERTY TAXABLE.

See CONSTITUTION, 4.

1. A membership in the Duluth Board of Trade is property which the legislature, under the Constitution of the state, might by appropriate laws tax.

—State v. McPhail, 398.

2. R. L. 1905, § 794, providing that all real and personal property in this state and all personal property of persons residing therein, except exempt property, is taxable, means that all personal property of whatever nature not exempt from taxation shall pay taxes. Under this section a membership in the Duluth Board of Trade was properly taxed as personal property of the member.

—State v. McPhail, 398.

3. R. L. 1905, § 797, providing that "personal property shall be construed to include," and naming 11 classes of property, does not exempt from taxation or render not subject to taxation personal property not included within any of the classes named.

—State v. McPhail, 399.

## TAXATION—Continued.

4. There has been no such settled construction of the statutes referred to as to justify the application here of the doctrine of practical construction.  
—State v. McPhail, 399.

## REDEMPTION FROM TAX SALE—NOTICE.

5. To redeem from a tax sale made under chapter 339, p. 557, Laws 1901, the owner must pay the subsequent delinquent taxes paid by the purchaser, and a notice of expiration of the time for redemption which does not include such taxes so paid is fatally defective.  
—Burnside v. Moore, 321.

## PAYMENT OF TAXES.

## See ADVERSE POSSESSION, 4.

6. The notice of expiration of the time for redemption from tax sales required to be given by chapter 270, p. 406, Laws 1905 [see G. S. 1913, § 2149], must comply in substance with the form prescribed by section 47, c. 2, p. 26, Laws 1902.  
—Burnside v. Moore, 321.
7. The rights of the purchaser of lands, forfeited to the state for nonpayment of taxes before the enactment of chapter 2, p. 1, Laws 1902, and sold to him before the Revised Laws of 1905 went into effect, are governed by the law in force prior to 1902; and where a defective notice of the time to redeem has been given, such purchaser may give a new and proper notice, and thereby perfect his title, unless redemption be made.  
—Burnside v. Moore, 322.

## LIMITATION AS TO TIME OF NOTICE.

8. The limitations contained in chapter 271, p. 407, Laws 1905 [G. S. 1913, § 2150], apply only to tax certificates issued before the lands became forfeited to the state and to notices of expiration of the time to redeem issued thereon. The time for giving such notices as to lands forfeited to the state remained unlimited.  
—Burnside v. Moore, 322.

## EQUALITY OF TAX AND ASSESSMENT LIENS.

9. A tax title based on a single forfeited sale for taxes for the years 1891, 1892, and 1902 to 1909, inclusive, is equal in right of priority with a lien based upon a St. Paul city assessment accruing in 1909, following Gould v. City of St. Paul, 120 Minn. 172, 139 N. W. 293, and Midway Realty Co. v. City of St. Paul, 124 Minn. 300, 145 N. W. 21.  
—Midway Realty Co. v. City of St. Paul, 296.

## TAXATION—Continued.

10. An owner of property cannot cut out a city assessment on his property by buying up a subsequent tax title. The evidence in this case is insufficient to sustain a finding that the intervening defendant holds an independent lien superior to the rights of the defendant city.  
—Midway Realty Co. v. City of St. Paul, 296.

## EQUALITY OF TAX AND ASSESSMENT LIENS.

11. Applicant holds a Governor's deed, issued April 27, 1912, pursuant to a forfeited tax sale held November 13, 1911, for general taxes for the years 1896 to 1910. The city of St. Paul holds certificates issued on sale for local improvement assessments, warrants for collection of which were issued in 1900, 1901, 1907, and 1908. The time for redemption from these sales has now expired. Following *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293, it is *held*: Under chapter 200, Laws 1905, general tax liens and city assessment liens are of equal rank. The general rules as to tax liens of equal rank apply. Each lien is superior to all that precede it in time. A later tax or assessment lien will take priority over all earlier liens, whether for taxes or assessments.  
—Midway Realty Co. v. City of St. Paul, 300.

## WHAT DETERMINES PRIORITY OF LIEN.

12. Priority as between such liens is determined as of the date of accrual of the original lien, not as of the date of sale.  
—Midway Realty Co. v. City of St. Paul, 300.
13. All city assessments accruing in any year are equal in right of priority with the lien of taxes for that year.  
—Midway Realty Co. v. City of St. Paul, 301.
14. Where land is sold at a forfeited tax sale for taxes for a number of years for an entire amount, the lien of the holder of a certificate issued on such a sale is equal in right with an assessment lien accruing in any one of those years.  
—Midway Realty Co. v. City of St. Paul, 301.

## SAME—HOLDERS TENANTS IN COMMON.

15. Under chapter 200, Laws 1905, a tax title based on taxes for 1906 to 1909, inclusive, is equal in right of priority with title based on a St. Paul city assessment lien accruing in 1906. The holders of such titles are tenants in common. Such tax title is superior to a separate city assessment lien accruing at different times during years from 1896 to 1901, and is inferior to city assessment liens accruing in 1912. Following *Gould v. City of St. Paul*, 120 Minn. 172, 139 N. W. 293, and *Midway Realty Co. v. City of St. Paul*, 124 Minn. 300, 145 N. W. 21.  
—White v. City of St. Paul, 305.

## TAXATION—Continued.

## INHERITANCE TAX—TRANSFER BY EXERCISING POWER OF APPOINTMENT.

16. Acting under a power of appointment in a will executed by his mother in Kentucky, a testator residing in Minnesota exercised the power in his will, naming his nephews, residents of Tennessee, as the beneficiaries. The property which was the subject of this exercise of the power was indebtedness of corporations and individuals secured by bonds and mortgages which were at the time of the testator's death and for many years had been in the custody of a resident of Kentucky. It is *held* it was the exercise of the power of appointment that constituted the transfer of the property, and not its creation.

—State ex rel. v. Probate Court of Ramsey County, 508.

17. Under the inheritance tax law of this state [G. S. 1913, § 2271], the appointment, when made, is a taxable transfer in the same manner as though the property to which such appointment relates belonged absolutely to the donee of the power, and had been bequeathed or devised by the will. Therefore this case is treated as though the testator had actually owned the property, and had bequeathed it to his nephews.

—State ex rel. v. Probate Court of Ramsey County, 508.

18. As between debtor and creditor, the situs of a debt is the domicile of the creditor. But he may give it a situs elsewhere, and it may be taxed under the laws of the state where the evidences of indebtedness are deposited. But our statute imposes a tax upon the transfer of the property, and not upon the property itself. The transfer, having been made in this state by a resident thereof, is taxable here, although the actual situs of the property was at the time of the testator's death in Kentucky, and although such transfer may be subject to a tax in Kentucky.

—State ex rel. v. Probate Court of Ramsey County, 509.

## TENANT IN COMMON. See TAXATION, 15.

Where title is obtained under tax and assessment liens, equal in right of priority, by sale and expiration of the period of redemption, the holders thereof become by operation of law tenants in common of the property.

—Midway Realty Co. v. City of St. Paul, 301.

## TENDER. See INSURANCE, 12; SALE, 6.

## TITLE. See ABANDONMENT; ADVERSE POSSESSION, 1; ASSIGNMENT, 3, 4; DEED, 5; HOMESTEAD; PUBLIC LAND; SALE, 4; TAXATION, 19; TENANT IN COMMON.

**TITLE OF ACT.** See **STATUTE**, 4-6, 9; **WEIGHT AND MEASURE**, 2.

**TORT.**

**SEDUCTION OF BETROTHED.**

An affianced husband has no cause of action against one responsible for the seduction of his affianced wife, or for the alienation of her affections, or for her debauching, making proper the breach by him of the marriage contract.

—Davis v. Condit, 365.

**TOWN.**

**ACTS AS AGENT OF STATE.**

See **DRAIN**, 5.

**TRANSCRIPT.** See **COSTS**, 5, 7; **TRIAL**, 10.

**TRIAL.** See **PLEADING**, 1.

**MOTION TO COMPEL PLAINTIFF TO ELECT BETWEEN DEFENDANTS.**

See **PRINCIPAL AND AGENT**, 2.

**WHEN NO ELECTION OF THEORY BY PLAINTIFF.**

See **BROKER**, 3.

**DEMONSTRATIVE EVIDENCE.**

1. When a competent witness testifies that a photograph is a correct representation of the objects it purports to portray, it is not for the court to decide either that the witness is unworthy of belief, or that the photograph is misleading. In such case it is error for the court to exclude the photograph as misleading.

—Mitton v. Cargill Elevator Co. 72.

**MISCONDUCT OF COUNTY ATTORNEY.**

See **CRIMINAL LAW**, 6.

**MOTION FOR DIRECTED VERDICT.**

See **JUDGMENT NOTWITHSTANDING VERDICT.**

**CHARGE TO JURY.**

See **CRIMINAL LAW**, 9-11; **MONOPOLY**, 4.

2. Defendant, a railroad company, held precluded by its concessions on the 124 M.—41.

3



**TRIAL**—Continued.

trial from contending the court erred in charging it with negligence, as a matter of law, if it left a switch open, whereby plaintiff, an employee of its codefendant, was injured.

—Campbell v. Canadian Northern Railway Co. 245.

**ARGUMENT OF COUNSEL.**

See **CRIMINAL LAW**, 8.

3. Instruction *held* fatally erroneous as directing the jury, in effect, to disregard arguments of counsel.

—Svensson v. Lindgren, 386.

**REFUSAL TO CHARGE.**

See **MASTER AND SERVANT**, 20; **MUNICIPAL CORPORATION**, 15, 16.

4. It is not error to refuse requests to charge the jury when the charge, taken as a whole, sufficiently included the substance of the requests refused.

—Benson v. Lehigh Valley Coal Co. 229, 230.

5. The defense to an action for assault and battery was, both by the answer and the evidence on the trial, a denial of the allegations of the complaint and of the evidence of plaintiff; no justification was pleaded or attempted to be made on the trial. It is *held*, that the court did not err in refusing to instruct the jury upon the subject of justification as requested by defendants.

—Evertson v. McKay, 260.

**REQUEST NECESSARY.**

6. Defendant, not having, in its requests, referred to assumption of risk of an unlighted switch, *held* not entitled to complain of the trial court's failure to submit such question.

—Campbell v. Canadian Northern Railway Co. 246.

7. Failure of court, in instructing the jury, to call attention to the distinction between knowledge and notice, as imposing upon defendant the duty to warn, *held* not reversible error, in absence of request by defendant.

—Gillespie v. Great Northern Railway Co. 2.

**PROVINCE OF COURT—PROVINCE OF JURY.**

8. The court did not err in refusing to state to the jury that certain specified acts of the parties under certain conditions would prevent a recovery. The proper practice for the court was to define negligence and contributory negligence, and let the jury determine whether the acts of the parties in the situation disclosed by the evidence came within the definition.

—Bolstad v. Armour & Co. 157.

TRIAL—Continued.

OBJECTION TO CHARGE.

9. Charge *held* not subject to the criticism that it authorized a recovery for acts of negligence not alleged, or alleged, but not proved.  
—Skaggs v. Illinois Central Railroad Co. 503.

DOCUMENTS WITHHELD FROM JURY.

10. It was not error to decline to permit the jury, on its request, to have a transcript of the testimony of a witness given on a former trial.  
—Ruder v. National Council of Knights and Ladies of Security, 432.
11. It was not error to refuse to permit a letter in evidence to be taken into the jury room; the letter being read to the jury instead.  
—Ruder v. National Council of Knights and Ladies of Security, 432.

ANSWERING QUESTION OF JUROR.

12. The trial court did not err in answering a question asked by a juror.  
—Ruder v. National Council of Knights and Ladies of Security, 432.

VERDICT.

See INJUNCTION, 1.

GENERAL VERDICT SET ASIDE.

13. Action in ejectment. The court submitted to the jury evidence on the three grounds of plaintiff's claim to recover: (a) A true survey; (b) adverse possession and (c) practical location or acquiescence. A general verdict in favor of plaintiff was returned. *Held*: The court erred in submitting to the jury the question of the location of the government division line between the parties, and the evidence being far from conclusive in plaintiff's favor on either of the other two grounds, a general verdict, which may have been based upon the ground erroneously submitted to the jury, should not be permitted to stand.  
—Roy v. Dannehr, 234, 238.

FINDING OF COURT.

See MORTGAGE, 2; MECHANIC'S LIEN, 4; SPECIFIC PERFORMANCE, 2; VENDOR AND PURCHASER, 2.

CONCESSIONS OF ATTORNEY NECESSITATED THE FINDINGS.

See APPEAL AND ERROR, 19.

TROVER AND CONVERSION. See PLEADING, 2.

ULTRA VIRES. See MUNICIPAL CORPORATION, 6, 7, 21.

UNDISCLOSED PRINCIPAL. See PRINCIPAL AND AGENT, 1, 2.

VALUE. See BANK AND BANKING, 1, 2; EVIDENCE, 7, 18, 19; EXCHANGE OF PROPERTY, 3.

VENDOR AND PURCHASER. See EXCHANGE OF PROPERTY, 2.

1. The fact that a purchaser of land makes an examination of it before purchase does not necessarily preclude him from claiming fraud and reliance upon it. His making of an examination is a circumstance to be weighed carefully by the trial court in determining whether fraud was practiced, and, if so, whether the purchaser relied upon the fraudulent representations; but it does not, of itself, prevent a finding of fraud.

—Rudolphi v. Wright, 26.

#### ACTION BY PURCHASER.

2. The evidence sustains the findings that no conspiracy existed between defendants to defraud plaintiffs in their purchase of certain real estate, and also that no single defendant was guilty of deception, concealment, or fraud in the transaction.

—Stumpf v. Norton, 93.

3. The court found, and the proof supported the finding, that plaintiff was in possession by tenant when the defendant Rebecca received the conveyance from the defendant guilty of the misrepresentations. She made no inquiries of the tenant or of plaintiff, the landlord, as to their rights. She was ignorant of the misrepresentations having been made. Under the evidence she was not entitled to a finding that she was a good-faith purchaser without notice.

—Ludowese v. Amidon, 289.

4. A tenant's possession is notice of his landlord's rights in the premises, and one who claims as a good-faith purchaser under that situation must be charged with such information as an inquiry of the landlord would have elicited.

—Ludowese v. Amidon, 289.

5. Where the purchasers of real estate made a contract direct with the owners to buy at a stipulated price, then knowing that out of such price the owners were to pay commission to a broker employed by the purchasers' agent to assist in negotiating the deal, such purchasers may not, in the absence of fraud or collusion, recover of such owners any part of this commission.

—Stumpf v. Norton, 93.

6. The broker, under the facts found, was entitled to the reasonable commission the purchasers' agent agreed he should have, since the purchasers,

**VENDOR AND PURCHASER—Continued.**

knowing of this employment and that he was to have commission out of the purchase price to be paid the owners, nevertheless, without attempting to learn the amount of such commission, made the contract direct with the owners to purchase at a price which they knew included the broker's pay or commission.

—*Stumpf v. Norton*, 93.

7. Since the broker rightfully received the whole of the commission, the purchasers cannot recover from those who subsequently were permitted to share it.

—*Stumpf v. Norton*, 93.

**VERDICT.** See **TRIAL**, 13.

**VILLAGE.** See **CONSTITUTION**, 5; **CRIMINAL LAW**, 2; **MUNICIPAL CORPORATION**, 2, 3, 12.

**VITAL STATISTICS.** See **CONSTITUTION**; **STATUTE**, 4.

**WAGES.** See **DAMAGES**, 1.

**WAIVER.** See **COURT (PROBATE)**, 5; **INSURANCE**, 3, 4; **JURISDICTION**; **JUSTICE OF THE PEACE**, 1; **PLEADING**, 4.

**WAREHOUSEMAN.** See **CHATTEL MORTGAGE**, 2; **STATUTE**, 14.

**WARRANTY.** See **EVIDENCE**, 14; **SALE**, 2, 3.

**WATER AND WATERCOURSE.**

A lease by plaintiffs to defendant of a dam required the lessee to repair the dam and to keep it in repair, and to pay a fixed annual rental for its use. Under the facts in the case it is *held*, that the lease contemplated the use of the dam for the purpose of floating logs down the stream to the dam, and for no other purpose; that the lease was an assertion of the right of the lessor to lease the dam for that purpose, and of the lessee to use it for that purpose; that a provision in the lease that the lessee should use the dam in a lawful manner, and not do or suffer anything unlawful to be done in and about the demised premises, or in the use thereof, was not intended to forbid this contemplated use; and that the lessors, having been compelled to pay damages to land-owners on account of flooding caused by this use, cannot recover from the lessee the whole or any part of the amount so paid.

—*Munch v. McGrath*, 475.

**WEIGHT AND MEASURE.** See **STATUTE**, 9.

1. Chapter 156, p. 197, Laws 1911 (G. S. 1913, §§ 4611-4623), establishing a department of weights and measures, is a police regulation, and changes the prior law so that intent to defraud or commit wrong is not an element of the offense of selling or exposing for sale less than the quantity represented, and the exclusion of evidence tending to show absence of such intent was not error.  
—State v. People's Ice Co. 307, 314.
2. Under the rule established by the authorities any matter germane to, or connected with the subject of, weights and measures, might properly be placed under this title, unless excepted therefrom by the phrase in the title of the act, "providing penalties for interfering therewith."  
—State v. People's Ice Co. 312.
3. The word "therewith" may well be held to refer to the inhibitions contained in the act, and must be so held if necessary to sustain its validity.  
—State v. People's Ice Co. 312.

**WILL.** See **TAXATION**, 16, 17.

1. A deed which the grantor delivers to a third person with instructions to deliver it to the grantee upon the grantor's death is not testamentary in character.  
—Dickson v. Miller, 347, 350.

**EVIDENCE OF INCAPACITY OF TESTATOR.**

2. Where the issue is the mental capacity of a testator at the time of making a will, evidence of incapacity within a reasonable time before and after is relevant and admissible.  
—McAllister v. Rowland, 27.

**JUDGMENT OF APPOINTMENT OF GUARDIAN ADMISSIBLE.**

3. A judgment in proceedings for the appointment of a guardian of an incompetent person is admissible in evidence, but not conclusive, in any litigation, to prove the mental condition of the person at the time the judgment is rendered, or at any past time during which the judgment finds the person incompetent.  
—McAllister v. Rowland, 27.
4. When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove the fact at issue. It stands on the same basis as would other evidence of the mental condition of the testator at a subsequent time. Whether it has probative value, or is too remote, is largely for the trial court to determine. In

**WILL—Continued.**

this case, the decision of the trial court that the exclusion of such judgment was prejudicial error is sustained.

—McAllister v. Rowland, 27.

5. That the application was not to have the testatrix declared insane, but only to have a guardian appointed because of the impairment of her mental faculties by reason of old age, and her consequent inability to manage her affairs, did not render the adjudication inadmissible.

—McAllister v. Rowland, 27.

**PETITION FOR SUCH APPOINTMENT INADMISSIBLE.**

6. The petition for such an adjudication is not admissible on the ground that it was made by one of the devisees, and therefore an admission against interest, when there are others financially interested in sustaining the will.

—McAllister v. Rowland, 27.

**WITNESS.**

**OMISSION TO CALL WITNESS.**

See EVIDENCE, 20.

**COMPETENCY.**

See EVIDENCE, 3.

**CONVERSATION WITH PLAINTIFF'S INTESTATE.**

1. Offer to show incompetency of witness, under G. S. 1913, § 8378, to testify to conversations with plaintiff's intestate, on the ground of interest "in the event" of the action by reason of agreement to pay the note sued on, held insufficient as importing merely a *nudum pactum*.

—Svensson v. Lindgren, 386.

**PRIVILEGE OF PHYSICIAN.**

2. The testimony of a physician as to the instructions given his patient, and as to whether the patient obeyed such instructions, is within the privilege conferred by section 8375, G. S. 1913, and was properly excluded.

—Marfia v. Great Northern Railway Co. 466.

3. The patient does not waive his privilege by bringing an action to recover for the injuries for which the physician treated him, unless the action be against the physician for malpractice. Neither does he waive such privilege by presenting evidence in support of his claim, where such evidence is confined to matters outside his transactions with the physician.

—Marfia v. Great Northern Railway Co. 466.

## WITNESS—Continued.

4. Although a physician may testify to the fact that he has attended a person professionally, the statute (G. S. 1913, § 8375) seals his lips as to all the information acquired in consequence of his professional employment, and necessary for the proper performance of his professional duties.

—*Marfia v. Great Northern Railway Co.* 469.

5. Section 8375, does not limit the privilege to communications made by the patient, nor to information imparted in confidence; but extends to all information acquired by the physician in his professional capacity and necessary to enable him to act properly.

—*Marfia v. Great Northern Railway Co.* 469.

## IMPEACHMENT.

6. The trial court did not abuse its discretion in allowing plaintiff to be interrogated on cross-examination as to a prior independent assault committed by her upon a third person, such being within the permissible field of examination as to collateral matters to shake credibility; but it was improper to allow defendant subsequently to introduce testimony contradicting the answers so elicited.

—*Campbell v. Aarstad*, 284.

## CROSS-EXAMINATION.

See CRIMINAL LAW, 5.

## WORDS AND PHRASES.

1. The meaning of words and expressions is to be gleaned primarily from the document itself, but in case of ambiguity resort may, however, be had to surrounding circumstances.

—*Ekblaw v. Nelson*, 337.

2. The meaning of a word or term is often qualified by the context. In contracts that meaning must be adopted which sustains, and not the one which destroys and renders purposeless, the instrument.

—*Ekblaw v. Nelson*, 337.

3. The words "shall be construed to include" do not necessarily mean "shall only include." See R. L. 1905, § 797.

—*State v. McPhail*, 404.

4. The typographical mistake of printing "as" in place of "is" in the printed form of tax judgment disregarded.

—*Burnside v. Moore*, 327.

5. "For the purposes of this subdivision" in R. L. 1905, § 4081.

—*Bond v. Pennsylvania Railroad Co.* 202.

## WORDS AND PHRASES—Continued.

## 6. "Jointly and Severally."

—State v. Minneapolis Milk Co. 34, 37, 38.

## 7. What constitutes a taxable transfer of property under the inheritance tax law.

—State ex rel. v. Probate Court of Ramsey County, 508.

## WORK AND LABOR. See ASSIGNMENT, 1.

## SERVICES OF MEMBERS OF SAME FAMILY.

## 1. Where brothers and sisters live together as one family, the presumption is that no liability exists in favor of one or against another for services performed or support furnished.

—Knight v. Martin, 191.

## 2. Such presumption may be overcome by proof of facts and circumstances from which it is reasonable to infer that both parties understood that compensation should be made for such services.

—Knight v. Martin, 192.

3. Evidence examined and *held* insufficient to overcome such presumption.

—Knight v. Martin, 192.

[END OF VOLUME]

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